

NOTES AND COMMENTS

CONTROLLING INTERLOCUTORY ASPECTS OF PROCEEDINGS IN THE INTERNATIONAL COURT OF JUSTICE

Profound changes in the structure and composition of today's international community of states and equally profound changes in the kinds of disputes coming before the International Court of Justice are making essential a thorough review of the Court's methods of handling contentious cases, and possibly advisory cases as well. Attention has been focused on hearings, where some useful modifications have been introduced. It seems, however, that more is needed than adjustments in the oral proceedings, which nevertheless can serve as the point of departure for further developments. Article 48 of the Statute gives the Court almost unfettered power to "make orders for the conduct of the case . . . and to make *all* arrangements connected with the taking of evidence" (emphasis added). As will be seen, in 1999 the General Assembly of the United Nations encouraged the Court to adopt additional measures aimed at expediting its proceedings. This Note has the limited purpose of drawing attention to some recent measures taken by the Court with that end in view,¹ and suggests directions for a more fundamental change in the Court's procedures.

The Court's former president, Judge S. M. Schwebel, in his statement to the United Nations General Assembly on October 27, 1997, indicated that the Court was adopting a range of alterations to its working practices, as part of its efforts to maximize the Court's efficiency.² Not all of these alterations have been announced, but some can be deduced from several of the Court's recent pronouncements. One of those unannounced alterations has been to dispense with an oral hearing, even in instances where the Statute or the Rules of Court in their 1978 version would appear *prima facie* to require such a hearing of the parties.³ Such instances are found in a judgment, in orders regarding the admissibility of counterclaims, in one order indicating provisional measures of protection, in an order concerning the admission of a request for permission to intervene under Article 62 of the Statute, and in decisions under Article 31 of the Statute regarding the appointment of judges *ad hoc*. All of these instances relate to incidental proceedings, and all except the judgment relate to proceedings that were clearly interlocutory. This Note will survey this development and attempt to set it in a larger context.⁴ The remarks that follow are largely critical; they suggest that not all the Court's decisions were compatible with the expectations generated by the Rules of Court. That criticism is not intended to deter the Court from adjusting its Rules to overcome those divergences.

¹ For the Court's 1999 record, see Peter H. F. Bekker, *The 1999 Judicial Activity of the International Court of Justice*, *infra* at 412.

² UN Doc. A/52/PV.36 (provisional), at 5 (Oct. 27, 1997).

³ A linguistic curiosity one sometimes encounters in literature about the Court is the expression "oral hearings." Are any other kinds of hearings possible? Perhaps, yes. *Cf. infra* note 15.

⁴ In this Note, citations from the Court's judgments and orders not yet published in the last (1998, 1999) volumes of the Court's *Reports* have been taken from the Court's Web site, <<http://www.ijc-cij.org>>. They are given by date only. Press communiqués are also available on this site.

A Judgment

It is common ground that proceedings on a request for the interpretation of a judgment are independent proceedings, entered under a new number in the Court's General List. Article 98, paragraph 4, of the 1978 Rules of Court gives the Court freedom to decide whether, after the other party has filed its written observations on the request for interpretation, to afford the parties the opportunity to furnish further written or oral explanations. Nevertheless, whether or not the Court exercises that discretion does not alter the fact that the proceedings introduced by the request are new proceedings, standing on their own. As such, one might think that they would come within the scope of Article 43, paragraph 1, of the Statute, by which the proceedings shall consist of two parts: written and oral (*La procédure a deux phases: l'une écrite, l'autre orale*). That seems categorical enough and, being in the Statute, it overrides the Rules. Article 98 of the Rules cannot derogate from the Statute, and neither the Statute nor the Rules as they now stand foresee the possibility of dispensing with oral proceedings.

In the *Land and Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections) (Interpretation) case, the Court held a public session for the purpose of enabling the two judges *ad hoc* to make the required solemn declaration.⁵ In that session, the president emphasized that "a request for interpretation, inasmuch as it is submitted in an instrument instituting proceedings, does not fall within the category of incidental proceedings: it gives rise to a new case."⁶ That new case was "procedurally independent" from the principal case in progress between Cameroon and Nigeria following the dismissal of the preliminary objections.⁷ At the same time he stated that the Court considered that it had sufficient information on the positions of the parties after the filing of Cameroon's observations, and accordingly did not consider it necessary to invite the parties to furnish further explanations.⁸ The Court then proceeded to deliberate and in due course handed down a judgment read at a public session of the Court.⁹ That judgment was slightly more explicit. It stated that in light of the dossier submitted to it, the Court, considering that it had sufficient information on the positions of the parties, did not deem it necessary to invite them to "furnish further written or oral explanations" as "Article 98, paragraph 4, of the Rules allows it to do."¹⁰ In that judgment, the Court declared inadmissible the request for the interpretation of the earlier judgment.¹¹

This is the first time since the Permanent Court of International Justice commenced functioning in 1922 that a judgment of the Court has not been preceded by a hearing (as opposed to judgments of the Chamber of Summary Procedure, where different rules apply). The judgment creates a *res judicata*, and for that reason alone, dispensing with a hearing is a questionable precedent, to be followed only in the most exceptional circumstances. There is no provision in either the Statute or the Rules that requires a decision on the admissibility of a request for the interpretation of a judgment to be in the form of a judgment, but if it is in that form, the judgment normally should follow the two-phased procedure required by the Statute. Furthermore, in this case, where the request related to the interpretation of an interlocutory judgment on preliminary objections, it might be thought that even if "procedurally independent," the proceedings on the request itself would lead to an interlocutory decision that could be in the form of an order.

⁵ Press Communiqué 99/3 (Feb. 16, 1999).

⁶ CR 99/3 (Feb. 17, 1999).

⁷ *Id.*

⁸ *Id.*

⁹ See Press Communiqué 99/13 (Mar. 22, 1999).

¹⁰ 1999 ICJ REP. (Judgment of Mar. 25). Judge *ad hoc* Ajibola's strong dissenting opinion shows that the question of the application of Article 98 of the Rules was thoroughly ventilated in the Court's deliberations.

¹¹ *Id.*

Counterclaims

In the 1978 Rules of Court, for unexplained reasons the Court introduced in Article 80, paragraph 3, the requirement that in the event of doubt as to the connection of a claim presented by way of counterclaim and the subject matter of the claim of the other party, "the Court shall, after hearing the parties, decide whether or not the question thus presented shall be joined to the original proceedings." In that text, the expression "after hearing the parties" replaced "after due examination" in previous texts, and the reader is justified in assuming that it means what it says. The categorical language of that provision led me to write that it means that "in future there will always be some oral proceedings" in the event of doubt.¹² When those Rules were promulgated, neither the Permanent Court nor the present Court had had much experience of counterclaims, and none at all of cases where the admissibility of a counterclaim was challenged peremptorily immediately on receipt of the countermemorial—which made it reasonable to assume that should such a case occur, the Court would not diverge from the rule that it had established. This assumption was rudely shattered in 1997, however. When the Court was for the first time confronted with such a challenge to counterclaims presented in the countermemorial, it reacted in an unexpected way. In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, the applicant's immediate reaction was to challenge the admissibility of those counterclaims and to request a hearing at an early date, in accordance with Article 80, paragraph 3, of the Rules. The president (Judge Schwebel) convened a meeting of the agents, who agreed to submit written observations on the question of the admissibility of the counterclaims, at the same time contemplating hearings on the question. These written observations, recited quite fully in the Court's Order, also envisaged a hearing. However, after deliberating on the basis of those written observations, the Court thought otherwise:

Whereas, having received full and detailed written observations from each of the Parties, the Court is sufficiently well informed of the positions they hold with regard to the admissibility of the claims presented as counter-claims by Yugoslavia in the Counter-Memorial; and whereas, accordingly, it does not appear necessary to hear the Parties otherwise on the subject.¹³

The Court then found that the counterclaims were admissible as such and formed part of the current proceedings.¹⁴ A similar scenario was repeated in another case a few months later. There, too, the Court required a set of written observations from the parties, after which, as in the case above, it decided that it had sufficient information, and proceeded to make an order admitting the counterclaim.¹⁵ In the last counterclaim case to date, no objection was raised to the inclusion of counterclaims in the countermemorial, and the Court, acting *proprio motu*, admitted them without further discussion.¹⁶

¹² SHABTAI ROSENNE, *PROCEDURE IN THE INTERNATIONAL COURT: A COMMENTARY ON THE 1978 RULES OF THE INTERNATIONAL COURT OF JUSTICE* 171 (1983) (also published in *III THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920–1996*, at 123 (1997)); see Shabtai Rosenne, *Counter-claims in the International Court of Justice Revisited*, in *LIBER AMICORUM IN MEMORIAM OF JUDGE JOSÉ MARÍA RUDA* (Calixto A. Armas Barea et al. eds.) (forthcoming May 2000).

¹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Yugo.), Counter-claims, 1997 ICJ REP. 243, 256 (para. 26). The decision not to hold hearings was heavily criticized by Judge *ad hoc* Kreća (p. 267), Judge Koroma (p. 276) and Judge *ad hoc* Sir E. Lauterpacht (p. 279), but not by Vice-President Weeramantry in his dissenting opinion (p. 287).

¹⁴ *Id.*, *passim*.

¹⁵ *Oil Platforms* (Iran v. U.S.), Counter-claim, 1998 ICJ REP. 190. Judge Oda in his separate opinion criticized this procedure (at p. 215). On the other hand, Judge Higgins thought that oral submissions are neither required nor excluded by the terms of Article 80, paragraph 3, and that the Court has found sufficient freedom to decide, notwithstanding the apparent limiting terminology of that provision, that the parties may be heard "whether in writing or orally" on the question of jurisdiction as well as on the question of the connection of the counter-claim with the original claim (at p. 223).

¹⁶ *Land and Maritime Boundary between Cameroon and Nigeria*, Order, 1999 ICJ REP. (June 30).

Provisional Measures of Protection

Article 74, paragraph 3, of the Rules of Court provides that on receipt of a request for the indication of provisional measures, the Court shall fix a date for a hearing which will afford the parties an opportunity of being represented at it. There had been no instance of an indication of provisional measures being made without a hearing until March 1999. An urgent request for the indication of provisional measures relating to a person whose execution was scheduled for the following afternoon at 3 P.M. Arizona time was filed in the Court at 7:30 P.M. (The Hague time) on March 2, 1999. At a meeting with the acting president (Judge Weeramantry) at 9 A.M. (The Hague time) on March 3, the applicant requested that the indication should be made without a hearing. The Court acceded to this request, on the basis of Article 75, paragraph 1, of the Rules.¹⁷ That allows the Court to decide at any time to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures.¹⁸ The Court has read the word *examine* as allowing it to *make* such an order without giving both parties the right to be heard, or at least to submit observations, on the matter. But can a Rule of Court exclude the basic principle *Audiatur et altera pars*? Examination of a situation *proprio motu* does not in itself empower the Court to make an order *ex parte*.

Intervention

In cases of an application to intervene under Article 62 or 63 of the Statute, in which the admissibility of the intervention is to some extent a matter of discretion, the Court's practice is vacillating. In some cases it has decided not to deal with or not to admit the intervention without any hearing.¹⁹ Those decisions have been expressed in orders. In other cases, it has rejected a request (under Article 62) by a judgment rendered after written and oral proceedings. In those proceedings, one party had opposed the intervention.²⁰ The *res judicata* thus created bound the Court, and determined the geographical parameters of the delimitation that the Court was required to make. In another case being heard by a Chamber, the full Court was asked to determine the preliminary question whether the application for permission to intervene should be heard by the Court or by the Chamber. The Court sat in its current composition at that date. The president of the Chamber was no longer a member of the Court; did not sit in the Court; and was not invited to be present, which would have been permitted in application of Article 1, paragraph 3, of the Rules.²¹ The two judges *ad hoc* also were not present in that deliberation of the Court. Two members of the Chamber who were also members of the Court at that time were present. Here, too, the Court in this unusual composition, which included two members of the five-member Chamber, considered that it was sufficiently informed of the views of the states concerned without there being any need for oral proceedings "which the Rules of Court did not require in this

¹⁷ LaGrand (Germany v. U.S.), Provisional Measures, 1999 ICJ REP. 9 (March 3).

¹⁸ *Id.* Reservations were expressed by President Schwebel in his separate opinion at 21. That decision was rendered at 7 P.M. (The Hague time), Press Communiqué 99/8 (March 3, 1999). To appreciate the time element in this case, The Hague time is GMT + 1, and Arizona time is GMT - 7. That is, there is an 8-hour time difference between The Hague and Arizona. Given the instantaneity of modern communications, and the fact that the United States Embassy at The Hague maintains a full Legal Section familiar with international litigation experience, there is no obvious reason why a brief hearing could not have been arranged for this case.

¹⁹ Nuclear Tests (Austl. v. Fr.) (N.Z. v. Fr.), Application of Fiji to Intervene, 1973 ICJ REP. 320, 324, and 1974 ICJ REP. 530, 535; Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Application of El Salvador to Intervene, 1984 ICJ REP. 215. In that case the Court decided by a vote not to hold a hearing.

²⁰ Delimitation of the Continental Shelf between Tunisia and Libya, Application of Malta to Intervene, 1981 ICJ REP. 3; Delimitation of the Continental Shelf between Libya and Malta, Application of Italy to Intervene, 1984 ICJ REP. 3.

²¹ That provision has been applied once, to allow the Canadian judge *ad hoc* for the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.) case to be present at the meeting of the Court for the purpose of fixing the initial time limits for the proceedings in the Chamber that determined the case. 1982 ICJ REP. 15.

context, and which neither Nicaragua [the state seeking to intervene] nor the Parties had requested.” The Court embodied its decision in an order.²² The Chamber then went on to decide in respect of the request for permission to intervene, its decision being in the form of a judgment.²³

In the *Land and Maritime Boundary between Cameroon and Nigeria* (Application by Equatorial Guinea to Intervene) case, although neither of the parties objected to that intervention, there was a difference between them as to the precise nature of the intervention. The Court, acting on the basis of the written observations, found that Equatorial Guinea had sufficiently established that it has an interest of a legal nature that could be affected by any judgment that the Court might hand down for the purpose of determining the maritime boundary between Cameroon and Nigeria.²⁴ The Court therefore decided to admit the intervention to the extent, in the manner, and for the purposes set out in the Application for permission to intervene. The Order, which leaves open the issue of the precise nature of the intervention, makes no mention of any question of a hearing.

Judges Ad Hoc

Article 36 of the Rules provides, with respect to the choice of a judge *ad hoc*, that certain objections shall be decided by the Court, “if necessary after hearing the parties.” This question has recently arisen twice, and in neither case was it necessary to hear the parties. It first occurred in the preliminary objection phase of the *Lockerbie* case between Libya and the United Kingdom. The British member of the Court (Judge Higgins) was disqualified from sitting in that case, and the United Kingdom appointed Sir Robert Jennings, a previous member and president of the Court, as judge *ad hoc*. The Court invited the three governments concerned in the two cases (the United Kingdom, United States, and Libya) to submit observations on the application of that provision of the Rules. According to the judgment, “after due deliberation, the Court, by ten votes to three” decided to accept the appointment of the British judge *ad hoc* for that case. There is no mention of any hearing on the question.²⁵ The second instance arose in connection with Yugoslavia’s ten cases against members of NATO in 1999, entitled by the Court the *Legality of the Use of Force* cases. Five of the members of the Court had the nationality of five of the respondents. In the other cases, Yugoslavia objected to the choice of a judge *ad hoc* by the states concerned. Here, again, the Court, “after due deliberation,” found the appointment of the judges *ad hoc* justified in the provisional measures phase of the cases.²⁶

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Despite this tendency to dispense with hearings if at all possible, there are two cases in which the Court held hearings contrary to what could be expected from the Rules of Court. That occurred in two of the *Legality of the Use of Force* cases: those brought by Yugoslavia against Spain and against the United States. Article 38, paragraph 5, of the Rules, introduced in 1978, provides that when an applicant state proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the state against which the application is made, the application shall be transmitted to that state. It shall not, how-

²² 1990 ICJ REP. 3.

²³ 1990 ICJ REP. 92.

²⁴ *Land and Maritime Boundary between Cameroon and Nigeria* (Cam. v. Nig.), Application by Equatorial Guinea for Permission to Intervene, Order, 1999 ICJ REP., para. 13 (October 21). This case is pending.

²⁵ Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Preliminary Objections, 1998 ICJ REP. 9, 13 (para. 9).

²⁶ *Legality of Use of Force* (Yugo v. Belg.), Provisional Measures, Order, 1999 ICJ REP., para. 12 (June 2), and the corresponding paragraphs in the Orders of the same date in the cases against Canada, Italy, and Spain). Portugal did not appoint a judge *ad hoc*. These cases are pending.

ever, be entered in the General List, nor any action be taken in the proceedings, unless and until the state against which such application is made consents to the Court's jurisdiction. Yugoslavia's application against the United States referred specifically to Article 38, paragraph 5, of the Rules, and Spain invoked that provision in the oral proceedings.

In its application against Spain, Yugoslavia purported to base the jurisdiction on each country's declaration accepting the jurisdiction of the Court under Article 36, paragraph 2, of the Statute, and on the compromissory clause (Article IX) of the Genocide Convention.²⁷ Notwithstanding that by its terms the case did not come within the scope of Spain's acceptance of the compulsory jurisdiction and that Spain had made a reservation to Article IX of the Genocide Convention, the case was entered in the General List (No. 112). A hearing took place on Yugoslavia's request for an indication of provisional measures, and both parties appointed a judge *ad hoc*. In the application against the United States, where there was no *prima facie* jurisdiction, either—since the United States had not accepted the compulsory jurisdiction and had also made a reservation to Article IX of the Genocide Convention—Yugoslavia invoked Article 38, paragraph 5, of the Rules specifically. That case, too, was entered in the General List (No. 114), and a hearing was held. In both cases the Court found that the lack of jurisdiction was manifest, declined to indicate provisional measures, and ordered each case to be removed from the General List.²⁸ No explanation is given as to why those two cases were entered in the Court's General List, which, according to Article 38, paragraph 5, of the Rules, should not have been done in the first place.

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The Court has justified dispensing with hearings on the ground that it was sufficiently informed of the positions of the parties from the written observations submitted. It has done so even where there had been only one round of written observations, neither party having been given an opportunity to respond to the other's observations. But ensuring that the Court is adequately informed of the position of each party is only one function of oral proceedings. The hearing is the first direct confrontation of the parties face to face, and that alone can lead to a simplification of the issues. True, if the relations between the parties, and the delegations representing them before the Court, are strained, a hearing may exacerbate feelings or bring in personal factors the better avoided—which is certainly a factor that the Court is entitled, even obliged, to have in mind. That may be an unarticulated premise of some of the cases noted here.

While the Court's practices regarding hearings have become uncertain, this tendency to limit the oral proceedings, often a repetition of the written proceedings, is not to be discouraged. At the same time, we should note that the Court has formally introduced new practices as part of a broader effort to increase efficiency and reduce the costs of litigation. There was during the 1980s mounting criticism, after a case had been heavily pleaded in written proceedings, the oral proceedings were much too drawn out. Many suggestions were made that the Court, following the practice in major national courts, including the Supreme Court of the United States, should exercise more control over the time allowed for the oral proceedings. In addition to the financial costs to the Court, lengthy oral proceedings place a heavy financial and logistical burden on the states participating in them and on their counsel.²⁹ The issue had become acute with the growth in the Court's caseload. In the hearings in November 1995 in the two *Nuclear Weapons* advisory opinions, the Court laid

²⁷ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277.

²⁸ Legality of Use of Force (Yugo. v. Sp.) (Yugo. v. U.S.), Provisional Measures, Orders, 1999 ICJ REP., paras. 34 & 26 (respectively) (June 2). These two cases were removed from the General List.

²⁹ No less than 50 public sittings, covering two full months, were required for the oral proceedings before a Chamber in the *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras, Nicaragua intervening) case, and that after three rounds of written pleadings by the principal parties, and further pleadings by the intervening state. 1992 ICJ REP. 351.

down strict time limits within which each oral presentation was to be made. Establishing such limits is now regular practice. These time limits are usually determined by the Court after consultation with the parties.

In his concurring opinion in *Application of the Genocide Convention (Counter-claims)*, Sir E. Lauterpacht drew attention to the confused and confusing terminology of the Rules of Court in the matter of how observations are to be presented to the Court, whether in writing or after a hearing, and suggested that when the Rules are next revised, this is a matter that needs clarification.³⁰ He is certainly correct that there is much room for improvement and that litigants would welcome the clarification that he seeks. At present there is no provision in the Statute requiring a judgment in any particular interlocutory proceeding. Only Article 61, paragraph 2, requires proceedings in revision of a judgment to be opened by a judgment.³¹ The Rules of Court require the decision to be in the form of a judgment only in Article 79, paragraph 7, concerning the decision on a preliminary objection, and in Article 99, on revision of a judgment (following Article 61 of the Statute). In all other cases in which a decision of the Court may be required, the Rules are indifferent as to the form of the decision, which may be in a judgment, a formal order, or a simple decision duly conveyed to the interested parties. A clarification of the Rules of Court would not be enough, however. As is apparent from the foregoing survey of the Court's recent treatment of hearings, it is most desirable that the Court provide clearer indications of what its practices will be under whatever Rules are in force. The current situation is a source of difficulty for states and their legal advisers.

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It is important to try and assess factors that could lead the Court to hesitate today before it applies literally Rules of Court last drawn up in 1978. When the Permanent Court was established (1920), and likewise when the present Court was established (1945), the international community of states that both were designed to serve was small in number—around 50 or so—and relatively compact, and war weary. Both in 1920 and in 1945, the craft of diplomacy was also relatively “elitist,” and its practitioners reasonably close-knit. At the end of the century, the situation is quite different. The international community of states parties to the Statute now reaches the figure of 188, of which only one, Switzerland, is not a member of the United Nations. This change is the direct consequence of two processes—in part, interrelated, since both can trace their origin to the human rights provisions of the Charter and the evolution of the concept of self-determination. One is the massive decolonization of Africa, Asia, and the island states of the Pacific. This process has continued virtually without a break since the General Assembly of the United Nations adopted its decolonization resolution 1514 (XV) of 14 December 1960. In the last decade of the twentieth century, the distant relation of the decolonization process was the dissolution of federal states in Europe following the end of the Cold War, bringing in its train the emancipation of the “mini-states” of Western Europe and their membership in the United Nations. This completely unforeseen increase in the number of states parties to the Statute (to which the Court is therefore open) has in the nature of things increased the Court's workload, both actual and potential, beyond all expectations.³² Quite apart from that, often

³⁰ See *supra* note 13.

³¹ There has been one instance in which this rule has been invoked, namely, the *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Tunis. v. Libya), 1985 ICJ REP. 192.

³² The following contentious cases decided since 1960 have involved at least one decolonized or defederalized party: *Northern Cameroons* (Cameroon v. U.K.) (1963); *ICAO Council Appeal* (India v. Pak.) (1972); *Pakistani Prisoners of War* (Pak. v. India) (1973); *Continental Shelf Delimitation* (Tunis./Libya) (1981, 1982, 1985); *Continental Shelf*

the language of "parliamentary diplomacy" is direct and even shrill, and although such language has not yet found a place in Court proceedings, some speeches have come close to the borderline of propriety. A tandem development is the increased bulk of documents often annexed to pleadings. In addition, governments today are much more answerable to their constituencies than they were in 1920 or even in 1945. To withstand public and often hostile scrutiny at home, very full and heavily documented pleadings are required in an international case—one consequence of the democratization of public affairs.

Unlike other United Nations organs, the Court does not work on programs to be picked up and dropped at will or at the behest of some other organ. The Court is not free to choose what it will do, and it cannot adjust its work to the happenstances of this or that financial crisis of the United Nations. Nor can it grade disputes like eggs, seeing one dispute as large and another as small, the "small" ones going to a Chamber. For the parties all disputes are major, and states resorting to the Court are entitled to have their cases decided by all available judges, regardless of whether the matter involves thousands of square miles of territory, or the location of a few frontier posts, or an island so small that one needs a magnifying glass to see it on all but the largest of charts and maps.

The increasing financial stringency of the United Nations is another factor that has affected the Court. Indeed, financial constraints had become so grave that in 1997 the General Assembly invited the Court to submit its comments and observations on the consequences that the increase in the volume of cases before the Court had on its operation. The Court's reply was submitted in 1998, but the two immediate results were little more than palliatives.³³ The first was that the matter was discussed in the Sixth (Legal) Committee of the General Assembly before the Fifth (Administrative and Budgetary) Committee dealt with the Court's budget. The second was a small increase in the Court's staff to strengthen the Registry. Annex II to that Report contained the text of a Note relating to reexamination by the Court of its working methods. That Note dealt mainly with the length and content of both written and oral pleadings, and contained suggestions that the Court now gives to the parties early in the proceedings. Changes in the internal working methods of the Court related mainly to the Judges Notes, which under the Resolution on the Internal Judicial Practice of the Court appear as an essential element in the Court's collective deliberation after the hearing.³⁴ But they did not touch the major problems that litigants now face in the International Court.

Yet another factor is the huge proliferation of modern treaty law, both bilateral and multilateral. Many of these instruments contain dispute settlement provisions involving the Court in one way or another. The result is a change in the types of cases coming before the Court, leading to changes in the Court's role not only for the management of international law, but also in crisis management—including grave political situations of universal concern.

Delimitation (Libya/Malta) (1984, 1985); *Frontier Dispute (Burk. Faso/Mali)* (1987); *Certain Phosphate Lands in Nauru (Nauru v. Austl.)* (1993); *Territorial Dispute (Libya/Chad)* (1994); *Maritime Delimitation between Guinea-Bissau and Senegal* (1995); *Gabčíkovo-Nagymaros Project (Hung./Slovk.)* (1997); *Kabalu/Sedudu Island (Bots./Namib.)* (1999); *Application of the Genocide Convention cases (Bosn. & Herz. v. Yugo; Croat. v. Yugo.)* (both pending); the *Lockerbie cases (Libya v. U.K., Libya v. U.S.)* (both pending); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (pending); *Land and Maritime Boundary between Cameroon and Nigeria* (pending); *Sovereignty over Pulau Ligitan and Pulau Sipidan (Indon./Malay.)* (pending); *Diallo (Guinea v. Dem. Congo)* (pending); *Legality of Use of Force* (Yugoslavia v. Belgium) (Yugoslavia v. Canada) (Yugoslavia v. France) (Yugoslavia v. Germany) (Yugoslavia v. Italy) (Yugoslavia v. the Netherlands) (Yugoslavia v. Portugal) (Yugoslavia v. Spain) (Yugoslavia v. United Kingdom) (Yugoslavia v. United States)) (1999, eight cases pending); *Armed Activities in the Congo (Dem. Congo v. Burundi; Dem. Congo v. Uganda; Dem. Congo v. Rwanda)* (all pending); *Aerial Incident of 10 August 1999 (Pak. v. India)* (pending).

³³ For the Court's reply to that invitation, see United Nations, Report of the International Court of Justice, 1 August 1997—31 July 1998, 53 GAOR Supp. No. 4 (Doc. A/53/4), Annex I (1998).

³⁴ For that resolution, see INTERNATIONAL COURT OF JUSTICE, CHARTER OF THE UNITED NATIONS, STATUTE AND RULES OF COURT AND OTHER DOCUMENTS (5th ed. 1989), reprinted in SHABTAI ROSENNE, DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE/DOCUMENTS RELATIFS À LA COUR INTERNATIONALE DE JUSTICE 441 (1991).

Moreover, despite the proliferation of black-letter texts of treaty law, there has been no comparable refinement in the means for securing enforcement of the law, especially when the instruments establish *erga omnes* rules.³⁵

The Permanent Court first adopted its Rules of Court in 1922. They were amended slightly in 1926, 1927, and 1931, and revised after thorough review in 1936.³⁶ The International Court adopted those Rules with minor adaptations and amendments in 1946, and they remained unchanged until 1972. In that year the Court made a few amendments to the Rules, the most important (as far as concerns litigation techniques) relating to preliminary objections. The former well-established and well-understood practice of joining objections (especially to the admissibility) to the merits was abolished. In its place the Court introduced as a possible decision, a declaration that a specific objection “does not possess, in the circumstances, an exclusively preliminary character.” This change has severely confused modern litigation without any appreciable benefits either for the Court or for states, and has complicated the organization of coherent litigation strategy. In 1978 the Court promulgated a more thorough revision, which comprises the Rules currently in force. Comparison of the Rules of 1978 with those of 1922 will quickly show that they are all cast in the same mold, the mold of the diplomacy of the 1920s. The changes that have been made do not touch fundamentals. The only difference between litigation today and litigation in the 1920s is that today the proceedings are much more drawn out, the written and oral pleadings are much longer, and the individual opinions of judges are more frequent and also more extensive. These changes suggest that the time is ripe for a more fundamental review of the Court’s procedure than has yet been undertaken.

What the Court lacks in comparison with superior national courts is an official process—under judicial oversight—to control the development of a case up to the opening of the oral proceedings, and perhaps to make preliminary determinations where the parties are in dispute over the facts or over a matter of procedure. Neither the Permanent Court nor the present Court has been able to confer on the registrar much more than a duty to ensure the formal compliance of a written pleading with the appropriate rule of Court. What the Court needs is an equivalent to a master or even a special master found in one form or another in national jurisdictions. The Court is now actively pursuing a revision of its Rules,³⁷ and that provides a window of opportunity to strengthen the powers of the presidency to control the course of proceedings leading up to the hearings and even beyond (subject to occasional consultations with the parties as required under Article 31 of the Rules).

One possible approach would be to bring in the Chamber of Summary Procedure as a standing control or supervisory organ for the interlocutory phases. Article 50 of the Statute

³⁵ Cf. John Norton Moore, *Enhancing Compliance with International Law*, 39 VA. J. INT’L L. 881 (1999).

³⁶ In this period two conferences were convened by the League of Nations, in 1926 and in 1929, to examine certain aspects of the Court’s affairs. Those Conferences are only of historic interest today. The affairs of the International Court of Justice have not been the subject of diplomatic examination since the San Francisco Conference of 1945, when the United Nations was established.

³⁷ Three important collective works are useful for this purpose: BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, REPORT OF THE STUDY GROUP ON THE INTERNATIONAL COURT OF JUSTICE, EFFICIENCY OF PROCEDURES AND WORKING METHODS, first published as a supplement to the January 1996 issue of the *International and Comparative Law Quarterly*, and republished, with additions, as D. W. BOWETT ET AL., THE INTERNATIONAL COURT OF JUSTICE: PROCESS, PRACTICE AND PROCEDURE (J. P. Gardner & Chanaka Wickremasinghe eds., 1997); INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE: PROCEEDINGS OF THE ICJ/UNITAR COLLOQUIUM TO CELEBRATE THE 50TH ANNIVERSARY OF THE COURT (C. Peck & Roy S. Lee eds., 1997); FRANCISCO ORREGO VICUÑA & CHRISTOPHER PINTO, THE PEACEFUL SETTLEMENT OF DISPUTES: PROSPECTS FOR THE TWENTY-FIRST CENTURY (1999) (preliminary report and revised report) <http://www.minbuza.nl/english/conferences/c_peace_docs.html> (presenting a long series of comments by different governments and individuals, prepared in connection with the celebrations of the Centennial on the First International Peace Conference of 1899, listed in the appendix to UN Doc. A/54/381 (September 21, 1999)).

could provide an opening for that.³⁸ Functions for this control mechanism could be: to investigate the facts if they are not agreed between the parties; to assist the Court and the parties in ironing out difficulties and in determining whether there has been an adequate exchange of observations between them, or whether an interlocutory hearing is necessary; and to make recommendations with regard to the calling and examination of witnesses whenever a party wishes to have recourse to witnesses, on the basis of Article 48 of the Statute mentioned above. Under the current Rules of Court, both the president and the vice-president of the Court are ex officio members of that Chamber, and the Statute makes provision for participation in it of national judges and judges *ad hoc*. Together with the registrar (who should always be a qualified international lawyer), such a body ought to be able to exercise appropriate control over the contents of written pleadings, especially over the annexed materials (which seem to cause the Court special difficulties). The use of this Chamber as a "Steering Committee" for the Court, leaving the ultimate decision on procedural matters either with the Court itself or with the president, could also assist the president in his efforts to maintain a reasonable balance between the Court's reasons for its decision, and any individual opinions.

It is tempting to see in the Rules of the Tribunal and other related documents adopted by the International Tribunal for the Law of the Sea (ITLOS) a guide for a modern set of cost-effective rules of Court and of practice. No doubt the International Court will take a close look at those documents and even more at their application, and see whether they can be adopted or adapted to its use. But one must be careful not to rush to conclusions, for the two Courts have different constituent instruments, different functions, and different types of parties before them, even when the Rules look the same.³⁹

Since 1998 the Sixth Committee of the General Assembly has been taking more interest in the Court's affairs than previously, but not yet enough. The earlier debates about the Court from 1947 onwards had been held in the confrontational context of the Cold War and did not help the Court as the principal judicial organ of the United Nations.⁴⁰ Since the Court in 1968 started submitting an annual report to the General Assembly, the General Assembly's practice has been to do nothing more than take note of the report. No substantive action had been taken until 1999 when, for the first time, the Sixth Committee recommended a resolution, adopted by the General Assembly as Resolution 54/108, December 9, 1999, endorsing the Court's procedural suggestions set out in Annex II of its 1998 Report.⁴¹

One of those suggestions recalled the need for succinctness in the oral proceedings, and all of them called for changes in the practice of states in litigation before the Court. The General Assembly's resolution also invited the Court to keep its working methods under

³⁸ By Article 50 of the Statute, the Court may at any time entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

³⁹ For those Rules, see INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, BASIC TEXTS/TEXTES DE BASE 1998 at 15. In many instances those Rules copy the corresponding Rule of the International Court, differing only where the Statute of ITLOS differs from the Statute of the International Court of Justice. In fact, those Rules in some respects fail to learn from the consequences that have followed in the International Court from new provisions introduced in 1978—for instance, in connection with preliminary objections (Rules of the Tribunal, Article 97). Other related documents are the Resolution on the Internal Judicial Practice of the Tribunal (at p. 71) and the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal (at p. 78). For my preliminary observations on those Rules and their practical application, see *Shabtai Rosenne, International Tribunal for the Law of the Sea: 1996-97 Survey*, 13 INT'L J. MARINE & COASTAL L. 487, 501 (1998). A striking feature of the cases heard by that Tribunal in the initial period of 1997-1999 is the frequency which witnesses and experts have been called to testify and be subject to cross-examination and examination on the *voir dire*—something not really desirable or necessary in any international court or tribunal.

⁴⁰ Cf. the debates in the General Assembly leading to Resolutions 171 (II), Nov. 14, 1947; 2625 (XXV), Oct. 24, 1970; 3232 (XXIX), Nov. 12, 1974; and 37/10, Nov. 15, 1982.

⁴¹ United Nations, *supra* note 33.

periodic review and to adopt additional measures aimed at expediting its proceedings.⁴² This reference to "additional measures" is particularly noteworthy.⁴³

That resolution thus gives political backing to changes in practice that themselves can be seen as a reinterpretation of the Statute. That should encourage the Court not to shrink from needed innovation when reviewing its practice and procedure, and bringing them into line with the requirements, the capabilities, and the potentialities available to it at the start of the twenty-first century.

SHABTAI ROSENNE*

THE EMERGING MENTAL INCAPACITY DEFENSE IN INTERNATIONAL CRIMINAL LAW: SOME INITIAL QUESTIONS OF IMPLEMENTATION

The norms and mechanisms for international prosecution of humanitarian law and mass human rights violations¹ have been refined in the 1990s to include affirmation of the principle that separate (or "affirmative") defenses² to individual liability are admissible in international criminal law. Explicit recognition of the availability and nature of separate defenses is found in the statute of the international criminal court (ICC).³ Indirect application is found to a very limited extent in the Statute of the International Criminal Tribunal for the former Yugoslavia

⁴² The suggestion for this resolution came from the Special Committee on the Charter of the United Nations and on Strengthening the Role of the Organization, following a debate on practical ways and means of strengthening the International Court of Justice while respecting its authority and independence. See its report, GAOR, 54th Sess., Supp. No. 33 (A/54/33), paras. 117-22 (1999).

⁴³ At a press conference on February 15, 2000, the newly elected president of the Court, Judge Guillaume, announced further improvements in the Court's methods of work. These improvements include attempts to: reduce the large amount of documentation that parties submit to the Court; ensure that hearings do not last longer than necessary; and shorten whenever possible the time that the Court spends on its own deliberations. He also indicated that the Rules Committee (of which Judge Fleischhauer is chairman, replacing President Guillaume) will make proposals in the near future as regards witness evidence, counterclaims, and preliminary objections. Press Communiqué 2000/5 (February 16, 2000).

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¹ The term "international prosecution" will be used throughout to denote the normative, procedural, and institutional system for adjudication of alleged violations of international humanitarian and human rights law. For stylistic purposes, the adjudicatory institutions of this system of international criminal justice will be referred to collectively as "international courts."

² The term "defense" is used here to denote both "justifications" and "excuses," which act as a matter of law either to bar individual liability completely even though all elements of criminality are satisfied, or to serve as a basis for mitigation of punishment. See Albin Eser, "Defences" in *War Crime Trials*, in *WAR CRIMES IN INTERNATIONAL LAW* 251 (Yoram Dinstein & Mala Tabory eds., 1996) (difficulties in terminology in this area leave no other solution but to resort to the term "defences"). It therefore does not include a "failure of proof" defense involving questions of fact, under which the prosecution is unable to prove all the elements of criminality, including the requisite mental state of the accused. A "justification" provides exculpation for acts that are viewed as not wrongful and eliminates in all respects the criminal character of the act in question, whereas an "excuse" may exculpate a particular accused from accountability for a wrongful act under the unique facts of the concrete case. See Draft Code of Crimes Against the Peace and Security of Mankind, Art. 14 (Comment 2), in Report of the International Law Commission on the work of its forty-eighth session, UN GAOR, 51st Sess., Supp. No. 10, at 14, UN Doc. A/51/10 (1996), available in <<http://www.un.org/law/ilc/convents.htm>> [hereinafter 1996 ILC Draft Code]; see also GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 759 (1978).

³ Rome Statute of the International Criminal Court, July 17, 1998, Arts. 31 (grounds for excluding criminal responsibility) and 33 (superior orders and prescriptions of law), UN Doc. A/CONF.183/9*, available in <<http://www.un.org/icc>>, reprinted in 37 ILM 999 (1998) [hereinafter ICC Statute]. Art. 32 of the ICC Statute excludes mistake of fact and mistake of law from the list of defenses, but states that they can relieve an individual of criminal responsibility if they negate the requisite mental element of the crime. *Id.* This Note assumes that the ICC Statute will receive the necessary 60 ratifications required for its entry into force. Meanwhile, the Appeals Chamber of the *ad hoc* Yugoslavia Tribunal has taken the position that the provisions of the ICC Statute serve as evidence of customary international law. See Prosecutor v. Tadić, No. IT-94-1-A, Judgement, para. 223 (July 15, 1999), available in the ICTY Web site, <<http://www.un.org/icty>> [hereinafter ICTY Web site].

(ICTY),⁴ but not in the Statute of the International Criminal Tribunal for Rwanda (ICTR).⁵ Moreover, although the Appeals Chamber of the ICTY has rejected the argument that duress is a complete defense under customary international law or general principles of law to a charge of crimes against humanity involving the taking of innocent lives, it has implicitly accepted that duress could be available in other circumstances.⁶

A recent addition to the limited catalogue of available defenses⁷ is an ancient principle borrowed from municipal legal systems: the “mental incapacity”⁸ of the accused at the time the acts in question were committed. The principle, formulated as an excuse and not as indicating the absence of the mental state required for criminality, is codified in Article 31(1)(a) of the ICC Statute and also found in the procedural codes—the Rules of Procedure and Evidence (RPE)—of the ICTY and ICTR.⁹ It was applied in November, 1998, in the ICTY’s *Čelebići Camp* Judgement,¹⁰ in which the Trial Chamber defined “diminished responsibility,” a concept borrowed from the criminal law of England and Wales.¹¹

⁴ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Statute, Arts. 2(d), 3(b) (“military necessity” is a basis for justification), UN Doc. S/25704, annex (1993), *reprinted in* 32 ILM 1192 (1993) [hereinafter ICTY Statute]. Art. 7(4) of the ICTY Statute, while stating that “superior order” is not a defense to liability, adds that it may be considered in mitigation of punishment. *Id.*

⁵ International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, Statute, SC Res. 955, annex, UN SCOR, 49th Sess., Res. & Dec., at 15, UN Doc. S/INF/50 (1994), *reprinted in* 33 ILM 1602 (1994) [hereinafter ICTR Statute]. Art. 6(4) of the ICTR Statute includes the same provision as that found in Art. 7(4) of the ICTY Statute. ICTY Statute, *supra* note 4, Art. 7(4).

⁶ This inference is drawn from the separate opinions of the ICTY Appeals Chamber judges in *Prosecutor v. Erdemović*, Judgement, No. IT-96-22-A (Oct. 7, 1997), including the Joint Separate Opinion of Judges McDonald and Vohrah, paras. 32–89, the Separate and Dissenting Opinion of Judge Cassese, paras. 11–49, the Separate and Dissenting Opinion of Judge Li, para. 5, and the Separate and Dissenting Opinion of Judge Stephen, paras. 23–68 (including summary of the similar position taken by the Trial Chamber), *available in* the ICTY Web site, *supra* note 3. The important point is the Appeals Chamber did not consider a categorical rejection of duress in all circumstances, but only specifically when the underlying crime was the killing of innocent persons. For discussion of this issue in *Erdemović*, see Peter Rowe, *Duress as a Defence to War Crimes After Erdemović: A Laboratory for a Permanent Court?*, 1 Y.B. INT’L HUMANIT. L. 210 (1998); David Turns, *The International Criminal Tribunal for the Former Yugoslavia: The Erdemović Case*, 47 INT’L & COMP. L.Q. 461, 470–72 (1998).

⁷ Although this area of law is marked by absence of consensus even on fundamental points, see *infra* note 13 and accompanying text, it can be said that this list includes the closely circumscribed defenses of involuntary intoxication, self-defense, and duress (see ICC Statute, *supra* note 3, Art. 31(1)), superior orders (see *id.*, Art. 33(1)), and military necessity (see ICTY Statute, *supra* note 4, Arts. 2(d), 3(b)). For general discussion about these and other possible defenses, see: 1996 ILC Draft Code, *supra* note 2, Art. 14 (Comments 4–12); M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 448–509 (2d rev. ed. 1999); Eser, *supra* note 2; Yoram Dinstein, *The Distinctions Between War Crimes and Crimes Against Peace*, in WAR CRIMES IN INTERNATIONAL LAW, *supra* note 2, at 1, 6–15; Gerry J. Simpson, *War Crimes: A Critical Introduction*, in THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 1, 14–16 (Timothy L. H. McCormack & Gerry J. Simpson eds., 1997). Regarding specific defenses, see Jordan J. Paust, *Superior Orders and Command Responsibility*, in 1 INTERNATIONAL CRIMINAL LAW 223 (M. Cherif Bassiouni ed., 2d ed. 1999); Rowe, *supra* note 6.

⁸ The term “mental incapacity” is taken from paragraph 58 of the UN Secretary-General Report that recommended establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY). Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), *reprinted in* 32 ILM 1159 (1993) [hereinafter Report of the Secretary General]. The term “mental incapacity” will be used throughout this Note as shorthand for the variety of formulations that establish the mental condition of the accused at the time of the acts in question either as a basis for a complete or partial bar to liability, or as grounds for mitigation of punishment.

⁹ ICTY Rules of Procedure and Evidence, Feb. 11, 1994, 67(A) (ii) (b), UN Doc. IT/32, *available in* the ICTY Web site, *supra* note 3, *reprinted in* 33 ILM 484 (1994) [hereinafter ICTY RPE]; ICTR Rules of Procedure and Evidence, June 29, 1995, 67(A) (ii) (b), UN Doc. ITR/3 (1994), *available in* the ICTR Web site <<http://www.un.org/ict>> [hereinafter ICTR RPE].

¹⁰ *Prosecutor v. Delalić*, Judgement, No. IT-96-21-T (Nov. 16, 1998), *available in* the ICTY Web site, *supra* note 3, *summarized in* 38 ILM 57 (1999) [hereinafter *Čelebići Camp* Judgement]. See also the case note by Olivia Swaak-Goldman, *Prosecutor v. Delalić*, 93 AJIL 514 (1999), which covers the many issues in the Judgement other than mental incapacity.

¹¹ In keeping with standard usage, I will refer to the legal system of England and Wales as the “English” legal system.

The mental incapacity defense presents a multifaceted challenge to the system of international prosecution. For one thing, the subject area of defenses is extremely unsettled despite the recognition of separate defenses as described above. Lawmakers and jurists have long been ambivalent about the desirability of formulating discrete separate defenses,¹² and even among those favoring such a step, there has been much disagreement on the defenses to be recognized and on their specific elements.¹³ Such disagreement was apparent, for example, during the process of drafting the ICC statute's provision on the mental incapacity defense.¹⁴ Particularly because of the substantive differences in the defense as defined by different municipal legal systems, the use of the defense by international courts also raises questions about restraints on their norm-creating authority under "general principles of law."¹⁵ Moreover, incorporating methodologies and taxonomies (or diagnostic categories) from psychiatry into the framework of international prosecution presents new substantive, procedural, and evidentiary issues. The interweaving of legal and psychiatric issues, coupled with the visibility and complexity of the mental incapacity defense, has already made the defense a matter of intense public controversy in domestic legal systems. This same kind of controversy within the international arena and the negative public perception of the defense as an excuse from individual accountability could have implications for the credibility both of the fragile system of international prosecution, and of the goal of advancing a "culture of legality."¹⁶

The international courts' development of substantive law in this area—on questions associated with defining the nature and parameters of the defense—will take time. But some related questions concerning procedure and the consequences of a successful defense are more immediate. After outlining the current status of the substantive law of the emerging mental incapacity defense, this Note will identify certain pressing questions that remain unanswered because of gaps or ambiguities in the normative base for international prosecution.

I. EMERGENCE AND CURRENT STATUS OF THE MENTAL INCAPACITY DEFENSE IN INTERNATIONAL LAW

The question of the mental incapacity defense received little attention in international law prior to the establishment of the institutional structure for international prosecution in

¹² See Eser, *supra* note 2, at 252 (citing "psychological reservations"); Simpson, *supra* note 7, at 14; 1996 ILC Draft Code, *supra* note 2, Art. 14 (Comments 4–12).

¹³ The result has been development of an "unstructured conglomerate" of traditional defenses "assembled from different legal traditions." Eser, *supra* note 2, at 273. Characterizing the doctrinal status of defenses as a "vast *terra incognita*," *id.* at 252, Eser notes that the "whole area of defences requires a much more comprehensive and through elaboration than has been offered thus far." *Id.* at 273. The scholarly discussions concerning defenses offer a number of divergent viewpoints. See sources cited *supra* note 7. The difficulty of achieving agreement on these questions is reflected in the ILC's delegation of identification and definition of defenses to the courts: Article 14 of the 1996 Draft Code of Crimes Against the Peace and Security of Mankind states in full that "The competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime." 1996 ILC Draft Code, *supra* note 2, Art. 14. According to one commentator, the ILC's commentary to Article 14 "suggests that this approach was taken because of the inability of the members to agree upon which defenses ought to be recognized or how they ought to be formulated." Paul H. Robinson (commenting for the Association Internationale de Droit Penal), cited in M. CHERIF BASSIOUNI (with the collaboration of Peter Manikas), *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 424 (1996) [hereinafter BASSIOUNI, *THE LAW OF THE ICTY*].

¹⁴ See *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 416, 491 (M. Cherif Bassiouni ed., 1998) [hereinafter ICC STATUTE: A DOCUMENTARY HISTORY]. Two different formulations of the defense were among the proposed provisions compiled by the Preparatory Committee on the Establishment of an International Criminal Court in 1996. See *id.* at 491. The defense in its final wording was placed in the consolidated draft statute at the December 1997 meeting of the Preparatory Committee. See *id.* at 319.

¹⁵ See the prescient observation in M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law"*, 11 MICH. J. INT'L LAW 768, 769 (1990) (quite likely that "General Principles" will become the most important source of international law in the 1990s). The separate opinions in the ICTY Appeals Chamber decision in *Erdemović*, *supra* note 6, contain a spirited dialogue on the identification and use of general principles of law in determining the availability of duress as a defense. See Turns, *supra* note 6, at 470–72.

¹⁶ M. Cherif Bassiouni, *Historical Survey: 1919–1998*, in 3 INTERNATIONAL CRIMINAL LAW, *supra* note 7, at 597, 634.

the 1990s.¹⁷ The ICTY Statute¹⁸ is itself silent on the question, but the May 3, 1993, Report of the UN Secretary-General, which presented the draft statute subsequently adopted by the Security Council,¹⁹ did include this comment: "The International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations."²⁰

Currently, the content of the mental incapacity defense is slim, consisting of its *normative base*—Article 31 (1) (a) of the ICC Statute and RPE 67(A) (ii) (b) of the ad hoc tribunals—and the ICTY's definition of the "diminished responsibility" component in *Čelebići Camp*. The first step in development of the normative base came in an oblique fashion, with the ICTY's recognition of the general principle in its RPE.²¹ Rule 67(A) (ii) (b), which is located amid the rules on production of evidence in the discovery stage of the proceeding, states:

As early as reasonably practicable and in any event prior to the commencement of the trial . . . the defence shall notify the Prosecutor of its intent to offer: . . .

(b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.²²

The ICTR adopted the same formulation in its RPE, Rule 67(A) (ii) (b), in June, 1995.²³

¹⁷ Professor Bassiouni proposed codification of the principle in 1987 and set forth a formulation based on the Model Penal Code of the American Law Institute. M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 110, 112 (1987) [hereinafter BASSIOUNI, DRAFT INTERNATIONAL CRIMINAL CODE]. In commentary on a 1945 decision by the U.S. Military Commission, the UN War Crimes Commission suggested that a "defense of madness" might have been raised. 3 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 60, 61 (1948) (trial of Peter Back) [hereinafter LAW REPORTS]. In 1948, a Dutch court reduced an offender's sentence for war crimes on the grounds of his mental condition at the time the acts were committed. See 13 LAW REPORTS 131, 132, 137 (1949) (trial of Wilhelm Gerbsch). International tribunals have also received testimony from mental health professionals on other questions. At the Nuremberg Trials, defendants Rudolf Hess and Julius Streicher were examined to determine if they were fit to stand trial. Summarized in TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 149–51, 178–79 (1992). Two defendants before the ICTY, Dražen Erdemović and Esad Landžo, also underwent psychiatric examinations for this purpose. Prosecutor v. Erdemović, Sentencing Judgement, No. IT-96-22-T, paras. 5–8 (Nov. 29, 1996), available in the ICTY Web site, *supra* note 3; *Čelebići Camp* Judgement, *supra* note 10, para. 36 (examination of defendant Esad Landžo). Both were found competent, although Erdemović was first found unfit (a decision that was later changed). Also, in another ICTY proceeding, mental health professionals offered testimony concerning the mental condition of a key prosecution witness. See Prosecutor v. Furundžija, Judgement, No. IT-95-17/1-T, paras. 98–99, 103–04 (Dec. 10, 1998), available in the ICTY Web site, *supra* note 3. The defense unsuccessfully sought to establish that the witness's post-traumatic stress disorder diminished her credibility. See *id.*, paras. 108–09.

¹⁸ Unless otherwise stated, this discussion will focus on the ICTY, and not the ICTR; to this author's knowledge, the latter has not yet construed Rule 67(A) (ii) (b) of its RPE. For a detailed report on the ICTY's overall jurisprudence, including extensive bibliography, see Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AJIL 57 (1999). A valuable source of documentation and commentary is VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS, (1995) [hereinafter MORRIS & SCHARF, AN INSIDER'S GUIDE TO THE ICTR].

¹⁹ Report of the Secretary-General, *supra* note 8. The ICTY was established pursuant to UN Security Council Resolution 827 of May 25, 1993. SC Res. 827, UN SCOR, 48th Sess., Res. & Dec., UN Doc. S/INF/49 (1993).

²⁰ Report of the Secretary-General, *supra* note 8, para. 58. The Security Council adopted the Secretary-General's draft statute without change and without comment on the "mental incapacity" question. See 1 MORRIS & SCHARF, AN INSIDER'S GUIDE TO THE ICTR, *supra* note 18, at 33.

²¹ The ICTY adopted the RPE in plenary session on February 11, 1994, pursuant to the Security Council's delegation of authority in Article 15 ("Rules of procedure and evidence") of the ICTY Statute. ICTY Statute, *supra* note 4, Art. 15.

²² See ICTY RPE, *supra* note 9. This formulation tracks closely a recommendation submitted to the ICTY by the United States in November, 1993. See 1 MORRIS & SCHARF, AN INSIDER'S GUIDE TO THE ICTR, *supra* note 18, at 177; 2 MORRIS & SCHARF, AN INSIDER'S GUIDE TO THE ICTR, *supra* note 18, at 534.

²³ Regarding the ICTR's formulation and adoption of its RPE, pursuant to Art. 14 of the ICTR Statute, see 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 413–18 (1998).

Article 31(1)(a) of the 1998 ICC Statute (under "Grounds for excluding criminal responsibility") states that a person shall not be criminally responsible if, at the time of that person's conduct, he or she "suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law."²⁴ The court's procedural and evidentiary rules will be important for the application of this provision. The ICC Preparatory Commission is currently preparing draft rules of procedure and evidence, with a completion deadline of June 30, 2000.²⁵

The *Čelebići Camp* Trial Chamber in November, 1998, became the first (and only, as of the time of this writing) organ to infuse the ICTY's "diminished or lack of mental responsibility" formulation with practical content.²⁶ One of the four defendants, Mr. Esad Landžo, was charged under Articles 2 and 3 of the ICTY Statute with the commission in 1992 of multiple war crimes, including willful killing, murder, and torture, while he was a guard in an internment camp housing Bosnian Serbs. He raised the mental incapacity defense in the form of a "diminished responsibility" plea. Five psychiatrists—one retained by the defense, another by the prosecution, and three appointed by the court—testified concerning Landžo's mental state at the time of the acts in question. All of the psychiatrists had conducted lengthy interviews with Landžo at the detention unit in The Hague, and their testimony was based almost entirely on the information gathered and the observations made in those sessions.²⁷ With the exception of the prosecution's expert,²⁸ all of the psychiatrists testified that Landžo had suffered from mental disorders at the time of the acts. The psychiatrists disagreed, however, concerning the specific identification of the disorders.²⁹

During the course of the proceeding, the Chamber ruled that it would not define the elements of "diminished responsibility" under Rule 67(A)(ii)(b)—which authorizes the defense but does not define it—prior to issuance of the final Judgement. The Chamber thereby rejected the defense's claim that withholding the definition violated certain rights of the accused under the ICTY Statute.³⁰ In its Judgment, the Chamber established a two-part test of "diminished responsibility": at the time of the alleged acts, the accused must (1) have been suffering from an "abnormality of mind"³¹ that (2) "substantially impaired" the

²⁴ ICC Statute, *supra* note 3, Art. 31(1)(a). This formulation is close to that proposed by Professor Bassiouni in 1987. See BASSIOUNI, DRAFT INTERNATIONAL CRIMINAL CODE, *supra* note 17, at 110. However, one potentially significant change in the wording is that the ICC Statute substitutes "destroys . . . capacity," ICC Statute, *supra* note 3, Art. 31(1)(a), for "lacking substantial capacity," see BASSIOUNI, DRAFT INTERNATIONAL CRIMINAL CODE, *supra* note 17, at 110, thereby perhaps narrowing the availability of the defense.

²⁵ This responsibility was mandated in Resolution F of the Final Act of the 1998 Rome Conference, *available in* <<http://www.un.org/law/icc/prepcomm/prepfra.htm>>. Regarding the ICC RPE (including the amendment thereof), see ICC Statute, *supra* note 3, Art. 51. See also William A. Schabas, *Follow up to Rome: Preparing for Entry Into Force of the International Criminal Court Statute*, 20 HUM. RTS. L.J. 157, 160–62 (1999).

²⁶ The following account summarizes that section of the *Čelebići Camp* Judgement, *supra* note 10, paras. 1156–86, devoted to the mental incapacity question. It is important to note that the Trial Chamber's treatment was limited to "diminished responsibility" and did not include detailed examination of the "lack of" component of the Rule 67(A)(ii)(b) formulation. See *id.*

²⁷ *Čelebići Camp* Judgement, *supra* note 10, paras. 1173, 1181 (the interviews were conducted approximately six years after the acts in question occurred).

²⁸ Dr. Landy Sparr testified that Landžo merely possessed certain personality "traits" that did not constitute a mental disorder. See *Čelebići Camp* Judgement, *supra* note 10, para. 1180. As to the significance of the term "traits," see *infra* note 100 and accompanying text.

²⁹ See *Čelebići Camp* Judgement, *supra* note 10, paras. 1173–1185. The three court-appointed experts originally were engaged to testify as to Landžo's fitness to stand trial, and all found that he was fit to do so. Prosecutor v. Delalić (*Čelebići Camp*), Order That the Accused is Fit to Stand Trial, No. IT-96-21-T (June 23, 1997), *available in* the ICTY Web site, *supra* note 3. Landžo later called two of these experts as defense witnesses, along with the psychiatrist whom he had retained.

³⁰ *Čelebići Camp* Judgement, *supra* note 10, paras. 78, 1159–60. Specifically, Landžo claimed that this withholding of the definition violated his rights under Articles 20(1), 21(4)(b), and 21(4)(e). See *id.*

³¹ This formulation means, the Chamber stated, a "state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal." *Čelebići Camp* Judgement, *supra* note 10, para. 1167. The Chamber adopted this construction from the English decision in *Regina v. Byrne*, 3 All E.R. 1, 4 (Q.B. 1960). In its application of the facts, the Chamber somewhat lackadaisically determined that this prong was satisfied, stating

ability of the accused to control his or her actions.³² On the facts, the Chamber accepted that Landžo suffered from an “abnormality of mind” at the time of his acts, but rejected his claim of diminished responsibility because he failed to satisfy the second part of the test concerning substantial impairment. In so doing, the Chamber did not directly dispute the testimony of the expert witnesses but, instead, discredited Landžo’s factual representations to the psychiatrists who interviewed him. Landžo was found guilty on seventeen counts of war crimes and sentenced to fifteen years’ imprisonment.³³ In pronouncing sentence, the Chamber cited Landžo’s mental condition as a mitigating factor.³⁴

In sum, at this embryonic stage, there are many questions about the mental incapacity defense that remain unresolved. The substantive base of the defense is limited to the two elements common to the general definitions of mental incapacity in the ICC Statute and the *Čelebići Camp* Judgement: (1) a mental condition (“mental disease or defect” in the former; “abnormality of mind” in the latter), and (2) an impairment of the accused’s ability to comprehend or control his or her acts (in the former, “destroys capacity to appreciate or control”; in the latter, “substantially impaired ability to control”).³⁵ There is, moreover, an implicit suggestion in *Čelebići Camp* that the accused’s mental condition, even if not amounting to “mental incapacity,” can still serve as a basis for mitigation of punishment. Finally, intertwined with this substantive but still evolving legal framework of the mental incapacity defense are many issues concerning the legal infrastructure of that defense: the role of mental health professionals in the gathering and evaluation of evidence; the consequences of a determination of full incapacity or reduced capacity; and a normative and procedural structure for the medical disposition of defendants and offenders suffering from mental illness or disorders. These issues remain largely unexplored in the context of international prosecution.

II. THE PRESENTATION AND EVALUATION OF FACTS: IMPLICATIONS FOR ADMINISTRATION OF JUSTICE, FUNDAMENTAL FAIRNESS, AND THE RIGHTS OF THE ACCUSED

Mental incapacity is unique among the limited number of defenses recognized in international criminal law because it entails incorporation of a discrete field of technical knowledge—namely, psychiatry—with its own terminology, taxonomy, and methods of inquiry. It can be anticipated that generalist adjudicators usually will lack the necessary technical training and experience to make their own independent evaluation of the factual basis for claims of mental incapacity.³⁶ As a consequence, mental health professionals undoubtedly will play an

that “it does appear from the testimony of the experts that Mr. Landžo suffered from a personality disorder.” *Čelebići Camp* Judgement, *supra* note 10, para. 1186. The Chamber then tacitly concluded that therefore a personality disorder qualified as an “abnormality of mind, but did not specify which of the disorders described by the expert witnesses it found to be dispositive. *Id.*

³² *Čelebići Camp* Judgement, *supra* note 10, paras. 1165–70. The definition is a synthesis of the formulations in *Byrne*, 3 All E.R. at 4 (“ability to control”), and Section 2(1) of the 1957 English Homicide Act (“substantially impaired”), Homicide Act, 5 & 6 Eliz. 2, ch. 11, § 2(1) (1957). Section 2(1) states:

When a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind . . . as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

Id.; see also R. D. MACKAY, MENTAL CONDITION DEFENCES IN THE CRIMINAL LAW 180 (1995). For background on the 1957 Homicide Act, see *infra* notes 83 and 87 and accompanying text.

³³ Landžo has filed an appeal with the ICTY’s Appeals Chamber.

³⁴ See discussion *infra* notes 79, 85, and 98–100 and accompanying text.

³⁵ Whether the textual differences in these respective definitions will be significant must await further construction and application by the courts. For expression of general concern for the unity of international law amid the proliferation of international judicial institutions, see Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 INT’L & COMP. L.Q. 848, 849, 861–62 (1995).

³⁶ On the relationship between judges and experts generally, and on the challenges that specialists’ complex scientific testimony poses for both professional judges and lay fact-finders, see MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 33 n.16, 143–52 (1997).

integral role as experts³⁷ in the international courts' gathering and evaluation of evidence necessary for reasoned determinations regarding a claim of mental incapacity.³⁸

The international prosecution system's framework for the admissibility and presentation of evidence is conducive to a significant role for experts.³⁹ The mode of presenting evidence is a hybrid structured primarily along adversarial lines but containing certain features of the court-centered model associated with Continental civil law systems.⁴⁰ Thus, the parties are free to manage the presentation of evidence and have the right both to present their own witnesses and to cross-examine other parties' witnesses.⁴¹ In addition, however, courts themselves are empowered to generate independent evidence by conducting their own fact-seeking and presentation.⁴² With regard to the mental incapacity defense, in particular, the legal framework for court-appointed experts is either already in place or under serious consideration. The RPE of the ICTY and ICTR expressly authorize court appointment of mental health professionals. For example, Rule 74bis of the ICTY RPE states:

A trial Chamber may, *proprio motu* or at the request of a party, order a medical, psychiatric or psychological examination of the accused. In such case, the Registrar shall entrust this task to one or several experts whose names appear on a list previously drawn up by the Registry and approved by the Bureau.⁴³

A similar delegation of authority is under consideration by the Preparatory Commission for the ICC.⁴⁴ Since courts have an obvious need to assess technical psychiatric testimony in cases involving the mental incapacity defense, it is likely, moreover, that court-appointed experts will participate—or perhaps even play a prominent role—in the requisite factual determinations.⁴⁵

In conjunction with this open system of evidence presentation, the admissibility of evidence is also very broad. The normative structure does not pose any explicit prospective

³⁷ To avoid confusion stemming from varying uses of the terms "expert" and "expert witness" in common law and Continental civil law systems, I will employ the term "expert" throughout this discussion. See David Kinley & Alan Rose, *The Quest for the Truth: A Comparative Analysis of the Role of Experts in Litigation*, 31 AUSTRALIAN J. FORENSIC SCI. 5, 8 (1999); Barbara Huber, *Criminal Procedure in Germany*, in COMPARATIVE CRIMINAL PROCEDURE 96, 149 (John Hatchard et al., eds., 1996).

³⁸ The Trial Chamber in *Čelebići Camp* endorsed the value of expert testimony, stating that its two-part test of diminished responsibility could be satisfied only by "medical evidence" provided by medical experts. *Čelebići Camp* Judgement, *supra* note 10, paras. 1166, 1170. Experts can be expected to play a central role not only in the factual inquiry, but also in influencing the prospective shaping of the normative content of the mental incapacity defense, identifying for the courts the clinical classifications that the courts might employ in defining the contours of the "mental condition" element in the mental incapacity defense. For a recent summary of issues in the relationship between law and psychiatry in municipal legal systems, see Alan R. Felthous, *Introduction to Mental Illness and Criminal Responsibility*, 17 BEHAV. SCI. & L. 143 (1999).

³⁹ The discussion in this section is limited to the ICTY and ICTR unless otherwise stated. The ICC Preparatory Commission passed its draft RPE, *see supra* note 25 and accompanying text, on first reading in December, 1999. See Criminal Court's Preparatory Commission Winds Up Session with General Agreement on Key Texts, UN Press Release L/2939, Dec. 17, 1999, available in <<http://www.un.org/News/Press/docs/1999/19991217.12939>>.

⁴⁰ See Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT'L L. 725, 727 (1999); Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 81 (1997).

⁴¹ See ICC Statute, *supra* note 3, Arts. 67(1)(e), 69(3); ICTY Statute, *supra* note 4, Art. 21(4)(e); ICTR Statute, *supra* note 5, Art. 20(4)(e); ICTY and ICTR RPE, *supra* note 9, Common Rule Art. 85(A) & (B).

⁴² See ICC Statute, *supra* note 3, Arts. 64(6)(b) & (d), 69(3). Common Rule 98 (Power of Chambers to Order Production of Additional Evidence) of the ICTY and ICTR RPE states in full: "A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance." See ICTY and ICTR RPE, *supra* note 9.

⁴³ ICTY RPE, *supra* note 9. Rule 74bis was added to the ICTY RPE as part of Revision 13 on July 9–10, 1998. The wording of Rule 74bis of the ICTR RPE, as it appeared at the ICTR Web site, *supra* note 9, on Dec. 31, 1999, is slightly different, but not in a material way. Rule 74bis was added to the ICTR RPE on June 8, 1998, as part of Revision 5. *Id.*

⁴⁴ The draft RPE of the ICC, considered by the Preparatory Commission during its second session from July 26, 1999, to August 13, 1999, contain a similar provision (Rule 6.13: Medical Examination of the Accused), available in <<http://www.igc.apc.org/icc/html/rpe6199907.html>>. Proposed Rule 6.13 is very similar in substance to Common Rule 74bis. See ICTY RPE, *supra* note 9. It was apparently part of the draft RPE package approved by the Preparatory Commission on first reading at its meeting in December, 1999. See *supra* note 39.

⁴⁵ This occurred in the *Čelebići Camp* proceeding. See *supra* notes 27–29 and accompanying text.

barriers to the admissibility of evidence: courts are authorized to admit all relevant evidence deemed to have probative value.⁴⁶ More specifically, the mental incapacity defense as currently constituted poses few grounds for the exclusion of evidence. The ICTY and ICC definitions of mental incapacity⁴⁷ are broadly stated, without any prospectively applied categorical exclusions. In addition, they both include the concept of volitional impairment,⁴⁸ which is expressed in terms of the inability to control one's actions. The incorporation of this concept considerably expands the range of potentially applicable, medically recognized mental disorders.⁴⁹ It can be therefore expected that most evidence relevant to the elements of the defense will be admitted by the courts as having "probative value."

The procedural and evidentiary framework for the mental incapacity defense has implications for judicial efficiency, administration of justice, and fundamental fairness. With regard to efficiency, there is, for example, some likelihood that the defense will involve extensive testimony and add considerable volume to the factual records of proceedings in which it is raised.⁵⁰ One response to this procedural difficulty might be through a change in the substantive law that narrows the definition of mental incapacity. The courts could identify categories of mental disorders that are excluded from the definition of "mental incapacity"—an approach that, in the United States, reduces the role of expert witnesses.⁵¹ Such close linkage between a legal test and specific diagnostic criteria has been criticized, however, because it fails to acknowledge the ongoing redefinition of mental illness or disorders; the lack of precision in the diagnostic process; and the unique nature of each individual's mental state.⁵²

The procedural and evidentiary framework for the mental incapacity defense also raises questions concerning both the administration of justice and fundamental fairness to the parties. These questions stem from the anticipated difficulty that judges will have in sorting out conflicting testimony. For one thing, the judges will probably be called upon to evaluate conflicting scientific testimony from the parties' experts. If a court-appointed expert also presents an opinion, this process could produce at least three different perspectives on the mental state of the accused. In addition, questions concerning the definition of specific categories of disorders, as well as the clinical assessment of the accused—questions that have been long debated in municipal systems—will perhaps be magnified in the international setting by the presence of multiple diagnostic classification systems,⁵³ thus creating the

⁴⁶ ICC Statute, Art. 69(4); ICTY and ICTR RPE, Common Rule 89(C). In a number of common law jurisdictions that employ the lay jury as trier of fact, much controversy over the mental incapacity defense centers on the nature and extent of limits on admissibility. See RALPH SLOVENKO, *PSYCHIATRY AND CRIMINAL CULPABILITY* 61 (1995). However, in international prosecution, judges are the triers of fact; there are not any lay jurors. See ICC Statute, *supra* note 3, Art. 36(3)(a); ICTY Statute, *supra* note 4, Art. 13(1); ICTR Statute, *supra* note 5, Art. 12(1).

⁴⁷ See discussion *supra* notes 24, 31–32, and 35 and accompanying text.

⁴⁸ A recurring debate in municipal systems is whether the test of mental incapacity should include the notion that emotion (volition) can render a person incapable of controlling his or her actions even though, as a matter of reason (cognition), he or she knows or appreciates what he or she is doing and the fact that it is wrong. Because volitional impairments include character disorders, their inclusion in the definition expands the range of potentially applicable mental states considerably beyond the psychotic or biological conditions that compromise cognition. See SLOVENKO, *supra* note 46, at 6, 20, 27, 41; MACKAY, *supra* note 32, at 181, 185. Psychiatry's identification and classification of mental disorders, particularly those at times deemed within the notion of volition, is dynamic and in a state of constant flux (see SLOVENKO, *supra* note 46, at 63): among those falling within the volitional concept are anxiety disorders, such as post-traumatic stress disorder (PTSD), and personality disorders.

⁴⁹ The *Čelebići Camp* Trial Chamber expressly stated that the mental disorder "need not be congenital" to qualify as an "abnormality of mind." *Čelebići Camp* Judgment, *supra* note 10, para. 1168. Also, in concluding that Landžo satisfied the first prong of the test, the Chamber accepted the evidence provided by the experts, none of whom testified that he suffered from a cognitive disorder, but four of whom cited disorders associated with volitional impairments.

⁵⁰ Much of the trial record for the *Čelebići Camp* proceeding is not yet available; however, of the available transcripts, 102 pages are devoted to testimony on one day (July 28, 1998) by the defense expert, Dr. Edward Brown Gripon, available in the ICTY web cite, *supra* note 3 (Transcript 980728ed).

⁵¹ See SLOVENKO, *supra* note 46, at 61 (specific standards narrow the role of the expert witness).

⁵² See *id.* at 64.

⁵³ See N. Sartorius, *International Perspectives of Psychiatric Classification*, 152 *BRIT. J. PSYCHIATRY* 9–14 (Supp. I 1988).

prospect of contradictory testimony on clinical criteria that might themselves be different from one system to the next.

In view of the above difficulties in assessing conflicting expert testimony, the question of evidentiary burdens takes on particular significance. The normative base for international prosecution does not expressly address the allocation of the burden of proof when a defendant raises the mental incapacity defense. The long-standing practice in international proceedings has been that the burden must be discharged by the party who asserts a fact.⁵⁴ However, this practice did not include proceedings in which the presumption of innocence is among the rights of the accused, as is the case in international criminal justice.⁵⁵ The ICC Statute specifically provides the accused, moreover, the right "[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal,"⁵⁶ and commentators have suggested that this protection might require the prosecution, rather than the accused, to discharge the burden once an affirmative defense has been raised.⁵⁷ This position nevertheless runs contrary to the holding of the *Čelebići Camp* Trial Chamber, which, borrowing from English law, ruled that diminished responsibility is an affirmative defense requiring the accused to bear the burden under a "balance of the probabilities" standard of proof.⁵⁸

Independent of how the above question concerning the burden of proof is decided, there remain questions concerning the degree to which courts, in assessing evidence relating to mental incapacity, can and should rely on their own court-appointed experts, and how these experts should interact with the parties' experts. The traditional practice in international adjudication⁵⁹ follows the Continental civil-law procedural model,⁶⁰ where the fact-finder controls evidence management and in this role appoints an expert to serve as an impartial adviser. The parties may also retain their own experts, but these experts are not themselves permitted to present testimony. Instead, they function as technical consultants in assisting the parties and in helping them to respond—for example, through cross-examination where it is permitted or the filing of comments—to the findings of court-appointed experts.⁶¹ Within Continental legal systems, this same model applies, moreover, to the mental incapacity

⁵⁴ See MOJTABA KAZAZI, BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 66–117 (1996).

⁵⁵ See ICC Statute, *supra* note 3, Art. 66; ICTY Statute, *supra* note 4, Art. 21 (3); ICTR Statute, *supra* note 5, Art. 20 (3).

⁵⁶ ICC Statute, *supra* note 3, Art. 67 (1) (i).

⁵⁷ See Kenneth S. Gallant, *Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court*, in 3 INTERNATIONAL CRIMINAL LAW, *supra* note 7, at 693, 711 (suggesting that the prosecution bears the burden, under a standard of proof of beyond a reasonable doubt); *Panel Discussion: Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 253 (1999) (remarks of Christopher L. Blakesley).

⁵⁸ *Čelebići Camp* Judgment, *supra* note 10, paras. 78, 1160, 1172. In municipal legal systems, the English Homicide Act, sec. 2(2), imposes the burden on the accused to prove the elements of the diminished incapacity defense, see MACKAY, *supra* note 32, at 180, and many jurisdictions in the United States place both the burden of production and persuasion on the defendant, see 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 284 (1984 & Supp. 1999).

⁵⁹ See GILLIAN M. WHITE, THE USE OF EXPERTS BY INTERNATIONAL TRIBUNALS 2–14 (1965) [hereinafter WHITE (1965)]. See also Gillian White, *The Use of Experts by the International Court*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 528–34 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996) (including examples from a range of adjudicatory settings at 528–529); KAZAZI, *supra* note 54, at 170–73; SHABTAI ROSENNE, THE WORLD COURT AND HOW IT WORKS 130–31 (5th rev. ed. 1995).

⁶⁰ On the use of experts in the Continental civil law procedural model generally, see Kinley & Rose, *supra* note 37, at 8–10; DAMASKA, *supra* note 36, at 78, 150–51; Robert F. Taylor, *A Comparative Study of Expert Testimony in France and the United States: Philosophical Underpinnings, History, Practice, and Procedure*, 31 TEXAS INT'L L.J. 181 (1996); Richard Vogler, *Criminal Procedure in France*, in COMPARATIVE CRIMINAL PROCEDURE, *supra* note 37, 14, 76–77; Huber, *supra* note 37, at 149–51; Neil Netanel Weinstock, *Expert Opinion and Reform in Anglo-American, Continental, and Israeli Adjudication*, 10 HASTINGS INT'L & COMP. L. REV. 9, 37–44 (1986); Horst Schroeder, *Problems Faced by the Impartial Expert Witness in Court: The Continental View*, 34 TEMPLE L.Q. 378 (1961); Morris Ploscowe, *The Expert Witness in Criminal Cases in France, Germany, and Italy*, 2 LAW & CONTEMP. PROBS. 504 (1935).

⁶¹ See WHITE (1965), *supra* note 59, at 38–39, 64, 81.

defense: the court's source of fact and evaluation is a court-appointed psychiatrist, with the parties limited to the engagement of expert advisers who may not present factual testimony.⁶²

The system of international prosecution is, in two respects, a marked departure from traditional practice in international proceedings. First, prosecutions are criminal, not civil, in character; specific, unique rights of the accused are recognized.⁶³ Put in another way, protecting the rights of the accused is an addition to the traditional notion of fundamental fairness to the parties.⁶⁴ Second, because of the international prosecution system's adversarial underpinnings, the accused—contrary to traditional practice in international adjudication—has the right to present his or her own testimony, including expert witnesses. (In this respect, international criminal prosecutions also differ from criminal proceedings in most Continental legal systems.) These considerations underscore the need to focus on the role of technical experts in the system of international prosecution. The normative base for that system, however, provides sparse guidance concerning their selection, status, and function;⁶⁵ it rarely distinguishes between experts and other witnesses, folding the former within the general rubric of the procedural and evidentiary framework.⁶⁶

The following centrally important questions arise concerning the role of court-appointed experts and their interactions with experts retained by the parties.⁶⁷

—*Appointment.* What should be the criteria and process for selecting the psychiatrists for the list referred to in Common Rule 74bis?⁶⁸ Should the parties have the right to challenge an appointment? If so, on what grounds, and should an exhaustive list of permissible grounds for disqualification be enumerated in the RPE? The rules of both the Inter-American Court of Human Rights and the European Court of Human Rights permit party objections. The rules of the former, however, permit disqualification only in specific, narrow circumstances, whereas the rules of the latter grant the Court total discretion in determining the merits of any objection.⁶⁹

⁶² See JOHN BELL ET AL., *PRINCIPLES OF FRENCH LAW* 229–30 (1998). Italy has taken steps to permit considerable participation by party-appointed experts within the rubric of the *Perizia*: the psychiatric examination and report performed and presented by the court-appointed expert. The prosecutor and the defense may each name an expert consultant who is permitted to participate with the appointed expert in all expert examinations required by the court, to examine the appointed expert's official report, and to provide his or her own report to the court. See J. Richard Ciccone & Stefano Ferracuti, *Comparative Forensic Psychiatry: II. The Perizia and the Role of the Forensic Psychiatrist in the Italian Legal System*, 23 BULL. AM. ACAD. PSYCHIATRY & L. 453, 454–57 (1995). For an assessment of the Continental approach in contrast to the adversary system from the point of view of a Dutch professor of forensic psychiatry, see F. H. L. Beyaert, *Different Penal Systems and Some Consequences for Forensic Psychiatry*, 5 INT'L J. L. & PSYCHIATRY 425 (1982). A critical appraisal of the influence of court-appointed psychiatrists in the People's Republic of China is found in Cheng Yang, *The Insanity Defence in China*, 4 INT'L BULL. L. & MENTAL HEALTH 8, 9–12 (1993). Sweden's use of court-appointed psychiatrists was assessed by a U.S. attorney in Lloyd K. Moyer, *The Mentally Abnormal Offender in Sweden: An Overview and Comparisons With American Law*, 22 AM. J. COMP. L. 71, 78–85 (1974).

⁶³ See ICC Statute, *supra* note 3, Art. 67; ICTY Statute, *supra* note 4, Art. 21; ICTR Statute, *supra* note 5, Art. 20.

⁶⁴ See WHITE (1965), *supra* note 59, at 11–14.

⁶⁵ See BASSIOUNI, *THE LAW OF THE ICTY*, *supra* note 13, at 606. The only formal reason in the normative structure for a party to designate a witness as an "expert" (as distinct from perceived enhancement of credibility) is that the "experts" are allowed to be present in the courtroom when other witnesses are testifying. See ICTY RPE and ICTR RPE, *supra* note 9, 90(D). The literature also contains little on the topic of experts in international prosecution. For example, despite their detailed analyses of development in procedure and evidence, the recent article by May & Wierda, *supra* note 40, and Dixon, *supra* note 40, do not discuss questions associated with the role of experts.

⁶⁶ For argument that expert testimony is inherently different from other evidence, see Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1125, 1208; Eric Ilhyung Lee, *Expert Evidence in the Republic of Korea and Under the U.S. Federal Rules of Evidence: A Comparative Study*, 19 LOY. L.A. INT'L & COMP. L.J. 585, 625 n.239 (1997); WHITE (1965), *supra* note 59, at 12.

⁶⁷ For a study of such interaction in a municipal law system (Israel), see Weinstock, *supra* note 60, at 44–52. According to Weinstock, the attempted "co-existence" of impartial court experts with common law adversarial principles has been the most troublesome area of Israel's introduction of a judicial power to appoint experts in civil proceedings. *Id.* at 47.

⁶⁸ For example, in France, applicants for the list of court-appointed experts are scrutinized by an independent advisory committee that interviews the candidates and make recommendations to a committee of judges, which makes the final decision. See Kinley & Rose, *supra* note 37, at 9.

⁶⁹ Rule 39.1 of the Rules of the Inter-American Court of Human Rights applies the standard found in Article 19.1 of the Court's Statute, which governs disqualification of judges. Article 19.1 states:

—*Role of the court-appointed expert.* For what purposes should the court engage its own expert? A court might, of course, engage an expert only for the purpose of assessing the accused's fitness to stand trial (which may, in turn, raise questions concerning the medical disposition of the accused).⁷⁰ If the court's expert is engaged specifically in the context of a mental incapacity defense, however, two distinct roles are foreseeable. First, the expert might function as an informal adviser, informing the court concerning the general findings and principles of psychiatry or evaluating information provided by the parties, including the parties' experts. Second, the expert might function as a formal testimonial witness pursuant to Common Rule 98.⁷¹ In this role, the expert might conduct and report on his or her own evaluation of the mental state of the accused, or offer testimony concerning that of the parties' experts.

—*If an adviser, transparency and opportunity for response?* An appointed expert's serving in the role of an informal adviser would potentially conflict with the court's duty to make a reasoned judgment in writing,⁷² at least if the court were to rely on its expert but without expressly stating so. In addition, considerations of fundamental fairness would appear to dictate disclosure to the parties of the appointed expert's communications with the court.⁷³ Further questions would then arise, however. Would all communications between the expert and the court be subject to mandatory disclosure to the parties? If the expert presents findings to the court, must they be in writing and made available to the parties? What safeguards are available to the parties for the purpose of ensuring that the appointed expert relied on accurate information and provided well-reasoned (though not therefore indisputable) conclusions to the court? Should the parties be given an opportunity for meaningful response to the appointed expert's advice to the court?⁷⁴

—*If a witness, cross-examination and rebuttal?* Article 85 of the Common Rules of the ICTY and ICTR are applicable to a court-appointed expert's formal role as a witness. Rules 85(A) and (B) state in full:

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

- (i) evidence for the prosecution;
- (ii) evidence for the defence;
- (iii) prosecution evidence in rebuttal;
- (iv) defence evidence in rejoinder;
- (v) evidence ordered by the Trial Chamber pursuant to Rule 98; and
- (vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.

Judges may not take part in matters in which, in the opinion of the Court, they or members of their family have a direct interest or in which they have previously taken part as agents, counsel or advocates, or as members of a national or international court or an investigatory committee, or in any other capacity.

Rules of Procedure of the Inter-American Court of Human Rights, *available in* <<http://www.cidh.oas.org>>. Rule 67 of the Rules of Court of the European Court of Human Rights, in contrast, states in relevant part: "The Chamber shall decide in the event of any dispute arising from an objection to a witness or expert." European Court of Human Rights Rules of Court, *available in* <<http://www.echr.coe.int>>.

⁷⁰ See discussion *infra* at notes 101–07 and accompanying text.

⁷¹ For Rule 98, see *supra* note 42 and accompanying text.

⁷² See ICC Statute, *supra* note 3, Art. 74(2) and (5); ICTY Statute, *supra* note 4, Art. 23(2); ICTR Statute, *supra* note 5, Art. 22(2). Art. 74(2) of the ICC Statute states in part: "The Court may base its decision only on evidence submitted and discussed before it at the trial." ICC Statute, *supra* note 3, Art. 74(2).

⁷³ In connection with this, see the critical comments in KAZAZI, *supra* note 54, at 173, regarding occasional cases when the Iran-U.S. Claims Tribunal has sought assistance from experts during the deliberation stage in the proceedings without notification to the parties.

⁷⁴ See discussion in Kinley & Rose, *supra* note 37; WHITE (1965), *supra* note 59, at 38–39, 64, 81.

(B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness.

It would thus appear under Article 85(B) that the parties have a right to cross-examine the appointed expert. Under a literal reading of Article 85(A), however, the parties do not have the right to offer rebuttal or rejoinder evidence. That is, after the presentation of evidence ordered by the Court under subsection (v), the opportunity for rebuttal or rejoinder evidence is past unless the Court decides otherwise in the "interests of justice." And if the Court does not decide otherwise, the appointed expert's testimony would be insulated from the procedures that are in place for testing the strengths and weaknesses of the testimony of the parties' experts. This insulation might place an unreasonable restriction on the parties, raising the question of whether the principle of "equality of arms" extends to the relationship between the parties and the Court, or applies only to that between the prosecution and the accused.⁷⁵

—*21-day requirement.* Common Rule 94*bis* requires presentation of the "full statement" of an expert witness to the other parties "as early as possible" and to the Trial Chamber at least twenty-one days prior to the date on which the expert is expected to testify.⁷⁶ Should a similar requirement be imposed on a court-appointed expert? What if the expert will be an adviser and not a witness?

In sum, the system of international prosecution's adoption of the mental incapacity defense requires, in turn, the adoption of special procedural and evidentiary rules to address the distinctive character of that defense. Some of these matters will be addressed by the courts in the performance of their adjudicatory function. Others, however, might be more amenable to clarification through the RPE amendment process. It would therefore be beneficial if appropriate procedural and evidentiary rules were considered for adoption as part of the ongoing review and refinement of the body of rules already in place.⁷⁷

III. CONSEQUENCES OF A SUCCESSFUL DEFENSE: COMPLETE EXCULPATION AND THE TWO VARIANTS FOR IMPLEMENTATION OF "REDUCED CAPACITY"

Municipal legal systems establish one or more of the following as possible consequences of a finding of "mental incapacity": a complete defense; a partial defense in which the defendant will be found guilty of a lesser crime than that with which he or she was charged; or mitigation of an offender's punishment. The normative base for international prosecution and the *Čelebići Camp* Judgement provide very little guidance concerning the consequences of such a finding, however. Article 31(1)(a) of the ICC Statute⁷⁸ clearly contemplates a complete defense but does not state whether either or both of the other options are also available. Rule 67(A)(ii)(b) is silent on the question, and it was not addressed in the

⁷⁵ Regarding development of the "equality of arms" principle at the ICTY, see May & Wierda, *supra* note 40, at 733, 739, 757.

⁷⁶ Common Rule 94*bis*(A) ("Testimony of Expert Witnesses") states:

[T]he full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify.

ICTY RPE and ICTR RPE, *supra* note 9.

⁷⁷ For example, the ICTY and ICTR RPE are subject to periodic review and amendment by the plenary bodies of those tribunals. As of this writing, the ICTY RPE have been amended at least 17 times, the most recent being November 30, 1999, and the ICTR, 5 times, the most recent being June 8, 1998. In addition, the formulation of draft rules of procedure and evidence is on the agenda of the ICC Preparatory Committee. See *supra* note 25 and accompanying text.

⁷⁸ See *supra* note 24 and accompanying text.

Čelebići Camp Judgement (despite the Trial Chamber's examination of the substantive elements of "diminished responsibility").⁷⁹

Whereas mental incapacity generally operates in municipal systems as a complete defense to criminal liability, a number of systems also recognize a notion of "reduced (mental) capacity." Perhaps influenced by ongoing medical recognition of nuances in the forms or degrees of mental illness, as well as by the growing belief that criminal sentencing should take into account the individual circumstances of the offender, reduced capacity is a response to the customary, all-or-nothing approach that recognized only two classes of criminal defendants: the sane and the insane.⁸⁰ As in the case of full mental incapacity, reduced capacity requires findings of mental condition and impairment; however, the assessment of these two factors, taken together, does not rise to the level of full mental incapacity justifying a release from all criminal liability or responsibility.

Implementation of this notion of "reduced capacity" has taken two forms. In one of these variants—the *Continental variant*⁸¹—the accused will bear liability for the crime as charged if the statutory elements are satisfied, but reduced capacity can serve as a mitigating factor in sentencing. It is worth noting, however, that in many municipal systems, the criminal codes define and thereby limit the type of evidence that can be introduced for this purpose.⁸² In the other of these variants—the *English variant*—reduced capacity does not serve as a justification for mitigating sentences. Instead, this variant reduces the level of criminal responsibility by finding an accused guilty of a lesser included offense instead of the higher crime for which he or she would have been liable but for reduced capacity. In its most prominent example, the English Homicide Act,⁸³ this "diminished responsibility" approach relieves an accused of the mandatory life sentence for murder by reducing the charge to manslaughter (a lesser included offense within the category of homicide), a crime for which the court has considerable sentencing discretion.

⁷⁹ It is unclear how, if at all, the Chamber would have made a distinction between the consequences resulting from a finding of "diminished responsibility" and those following from a finding of "lack of responsibility." The latter, which was not at issue in the case, would presumably provide the basis for a complete defense. See also discussion *infra* notes 85, 98–100 and accompanying text.

⁸⁰ See FAYE BOLAND, *ANGLO-AMERICAN INSANITY DEFENCE REFORM: THE WAR BETWEEN LAW AND MEDICINE* 99 (1999).

⁸¹ This term will be employed because the variant's origins are in legal systems of Continental Europe, even though it has been also adopted in numerous non-European states. Examples of the variant are found in the penal codes of France, Art. 122–1[2] (*translated in THE FRENCH PENAL CODE OF 1994, AS AMENDED AS OF JANUARY 1, 1999*, at 38 (Edward A. Tomlinson trans., 1999)); Germany, Art. 21 (*translated in THE PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY* 56 (Joseph J. Darby trans., 1987)); Italy, Art. 89 (*translated in THE ITALIAN PENAL CODE* 32–33 (Edward M. Wise trans., 1978)); Japan, Art. 39(b), and the Russian Federation, Art. 22 (*translated infra* note 82). For translation of Art. 39(b) of the Japanese Penal Code, and examples of its judicial application, see J. MARK RAMSEYER & MINORU NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* 155–58 (1999). Regarding operation of Art. 122–1[2] of the 1994 French Penal Code, see BELL ET AL., *supra* note 62, at 229–30.

⁸² The provisions of the recently-enacted Criminal Code of the Russian Federation (1996) are illustrative:

Article 21. Insanity

1. A person who at the time of committing a socially dangerous act was insane, that is, not capable of comprehending the actual nature or social dangerousness of his or her acts (or omissions) or of controlling them due to a chronic or temporary mental disorder, mental deficiency, or other mental condition, shall not be subject to criminal responsibility.
2. The court may impose medical treatment, as set forth in this Code, upon a person who committed a socially dangerous act while insane as contemplated in the criminal law.

Article 22. Criminal responsibility of a person with a mental disorder other than insanity

1. A sane person who at the time of committing a crime was not capable because of a mental disorder to comprehend fully the actual nature and social dangerousness of his or her acts (or omissions), or to control them, shall be subject to criminal responsibility.
2. A mental disorder other than insanity shall be taken into account by the court when it imposes punishment, and may serve as the basis for imposition of medical treatment.

Ugolovnyi kodeks rossiiskoi federatsii [Criminal Code of the Russian Federation], in *SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII*, Issue No. 25, Item No. 2954, at 6012–13 (1996) [translated by the author].

⁸³ See §2(1) of the Homicide Act, *supra* note 32. This discussion is based on BOLAND, *supra* note 80, at 98–101; MACKAY, *supra* note 32, at 180, 183–86; K. J. M. SMITH, *LAWYERS, LEGISLATORS AND THEORISTS: DEVELOPMENTS IN ENGLISH CRIMINAL JURISPRUDENCE 1800–1957*, at 329–31 (1998).

Both the Continental and English variants are therefore two-tiered systems of legal consequences flowing from a finding of (some form of) mental incapacity: a complete defense (reflecting a finding of "full" incapacity) and other, more varied consequences (reflecting a finding of reduced capacity). In the international prosecution system, then, two questions arise: does it also recognize such multiple consequences, and if so, which ones? The ICC Statute is indeterminate on these questions: although it is likely that the "destruction" of capacity in Article 31(1)(a) will result in a complete defense, it is possible that the same formulation negates the possibility of reduced-capacity consequences under either the Continental or English variant.⁸⁴ The ICTY and ICTR do not offer much more guidance. Common Rule 67(A)(ii)(b) seems to imply a two-tiered system of consequences, but it does not spell out the consequences of a finding either of "lack of . . . responsibility" or of "diminished responsibility." And despite the extensive discussion of diminished responsibility in *Čelebići Camp*, the ICTY Trial Chamber never stated what would have been the result if Landžo had presented a successful defense. Nevertheless, the Chamber's wholesale adoption of the definitional features of the English variant strongly suggests that that variant would have been followed.⁸⁵

A comprehensive assessment of the emerging mental incapacity defense—including, in particular, the concept of "reduced capacity"—should give careful consideration to both the English and Continental variants. Because of the specific approach adopted in *Čelebići Camp*, however, such an investigation should take as its starting point the historical and theoretical underpinnings of the English variant.⁸⁶

The English Variant: Reduced Level of Responsibility

The purpose of the English variant of diminished responsibility is to alleviate the inflexibility of the mandatory life sentence for the crime of murder. In this way, the scheme seeks to advance fundamental fairness, including the principle of proportionality between the crime and its punishment: the nature of the homicide is altered from murder to manslaughter because the homicide was committed by a person with reduced capacity not fully responsible for his or her action.⁸⁷

The ICTY's apparent embrace of the English variant is justified if the system of international prosecution is committed to the above goals, and if they can be achieved (or perhaps, only achieved) by introducing a reduced level of responsibility. It is evident from

⁸⁴ But cf. discussion *infra* at note 96 and accompanying text.

⁸⁵ However, it is difficult to see how the Chamber would have put this into effect, given the structure of crimes and sentencing in international criminal law. See discussion *infra* notes 94–95 and accompanying text. It is also possible, though doubtful, that the Chamber might have viewed "diminished responsibility" as a basis for mitigating Landžo's punishment; the Chamber mitigated Landžo's sentence on the basis of mental condition, see *supra* note 34 and accompanying text, even though it rejected his diminished responsibility defense, see *Čelebići Camp* Judgment, *supra* note 10, para. 1284.

⁸⁶ Because of *Čelebići Camp* and the unknown resolution of the ambiguities in Article 31(1)(a) of the ICC Statute, it is evident that the direct influence of the Continental variant on the embryonic international law notion of reduced capacity is more limited. However, it is not evident that the *Čelebići Camp* Chamber intended to disregard it; instead, it appears that the Chamber misread the Continental statutory authorities it cited in the Judgment, thereby erroneously concluding that there are no relevant or material differences between the English and Continental variants. See *Čelebići Camp* Judgment, *supra* note 10, para. 1171 (citing the French, German, and Italian statutory versions of the reduced capacity concept, see *supra* note 81).

⁸⁷ Thus, diminished responsibility is not available for crimes other than murder because it is not necessary: other crimes are not subject to mandatory sentencing. Because of the government's apparent desire to retain the mandatory death penalty for murder (upon parliamentary suspension of the death penalty in 1965 and its indefinite extension in 1969, life imprisonment became the mandatory sentence), Parliament in 1957 borrowed the diminished responsibility mechanism from Scottish law and placed it in the amended Homicide Act. See BOLAND, *supra* note 80, at 101, 115–16; MACKAY, *supra* note 32, at 180. It is noteworthy that the 1975 Butler Report, in one of the periodic efforts to reform the English scheme, declared that the diminished responsibility scheme should be discarded if it could be accompanied by abandonment of the mandatory life sentence for murder. See MACKAY, *supra* note 32, at 203.

the recognition of the mental incapacity defense that the system does, in fact, seek to advance fundamental fairness. There is a question, however, of whether the English sense of proportionality between crime and punishment is transferable to international law. In particular, it is far from certain that categories of international crimes exist in a hierarchy based on the perceived gravity of the crimes. Some support for such a hierarchy of international crimes is found, however, in the view that, of the core offenses—crimes against humanity, genocide, and war crimes—the first is distinct from, and stands above, the others.⁸⁸ Application of this proposition is found in the opinion of Judges McDonald and Vohrah in the ICTY Appeals Chamber Judgement in *Erdemović*. In the context of determining that the accused had not received proper warning that his plea of guilty to one count of a crime against humanity would result in a more stringent punishment than would a guilty plea to a war crime, the two judges advanced the proposition that international crimes are arranged in a hierarchy based on moral gravity.⁸⁹

Opposition to such an approach would presumably be grounded in resistance to the downgrading of some international crimes as less grave than others.⁹⁰ The ICC Statute already limits the jurisdiction of the Court to “the most serious crimes of concern to the international community as a whole,”⁹¹ which suggests that the parsing of such crimes (perhaps based on individual states’ assessments of their relative seriousness) would be detrimental to the mission of international prosecution. It also should be noted that the notion of lesser crimes has not received universal acceptance on the ICTY itself.⁹²

If the international prosecution system is to function effectively under the English variant, lesser included offenses will have to be found within one or more of the core crimes, or the core crimes themselves will have to be arranged in a hierarchical structure. In either case, a careful (and morally challenging) examination of the elements of international crimes would be necessary to determine the proper hierarchical structure. An impediment to the realization of such an undertaking in the near future is that the task of identifying the elements of international crimes is itself far from completed.⁹³

In sum, the adoption of the English variant would entail considerable doctrinal and practical complexities. Nevertheless, that variant could still be viewed as suitable for the system of international prosecution if, in fact, that variant is the necessary means of advancing the system’s objectives or if a decision is made to place priority on the principle of proportionality in determining liability. One should note, however, that the rationale for adopting the English variant—the desire to avoid imposing what are considered to be unduly harsh mandatory sentences—is absent in the international system because it lacks mandatory sentences.⁹⁴ In addition, the Continental, not the English, variant may be better

⁸⁸ See Bartram S. Brown, *The International Criminal Tribunal for the Former Yugoslavia*, in

3 INTERNATIONAL CRIMINAL LAW, *supra* note 7, at 489, 501.

⁸⁹ Prosecutor v. Erdemović, *supra* note 6, Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras. 19–25.

⁹⁰ See Eser, *supra* note 2, at 252–53; MORRIS & SCHARF, AN INSIDER’S GUIDE TO THE ICTR, *supra* note 18, at 111.

⁹¹ ICC Statute, *supra* note 3, Art. 5(1). See also the limitation of the jurisdiction of the ICTY and ICTR to “serious” violations of international humanitarian law. ICTY Statute, *supra* note 4, Art. 1; ICTR Statutes, *supra* note 5, Art. 1.

⁹² See, e.g., Prosecutor v. Erdemović, *supra* note 6, Separate and Dissenting Opinion of Judge Li, paras. 18–27. See also Turns, *supra* note 6, at 469.

⁹³ For example, the ICC Preparatory Commission is charged with drafting the elements of crimes by June 30, 2000. See Resolution F of the Final Act of the 1998 Rome Conference, *supra* note 25. Meanwhile, identification of the elements of crimes is an ongoing task in the jurisprudence of the ICTY and ICTR.

⁹⁴ The international court statutes do not have mandatory sentencing provisions. The sentencing provisions in the ICC, ICTY, and ICTR Statutes are very similar. For example, Article 78(1) of the ICC Statute states:

In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

ICC Statute, *supra* note 3.

The ICTY and ICTR Statutes (Arts. 24(2) and 23(2), respectively) contain a similar formulation, although they

suited to the international system because courts' discretion in imposing sentences enables them not only to tailor punishments to the crime, in general, but to take reduced capacity into account as a mitigating factor at the sentencing stage. This ability of courts to mitigate punishments could therefore satisfy the concerns about fundamental fairness that are raised by the mental incapacity defense—and without having to adopt the English variant and its notions either of reduced criminal responsibility or of lesser included offenses.

If the above conclusions are valid, it would be beneficial for the ICTY to consider abandoning the English variant. The most likely means of doing so would be by plenary amendment of Rule 67(A) (ii) (b), a step which should then also be followed by the ICTR, or by a judicial decision in which the ICTY would make the phrase “diminished responsibility” applicable only to mitigation of punishment, not to reducing the level of criminal responsibility.

The Continental Variant: Mitigation of Punishment

Certain questions arise if the Continental variant and the mitigation of punishment are viewed as the means of implementing the notion of reduced capacity. The threshold question is whether this option is available under the normative base. The sentencing provisions of the Statutes all include the “individual circumstances” of the offender as a potential mitigating factor, and mandatory minimum sentences are absent.⁹⁵ It is therefore clear that the ICTY and ICTR have the authority to mitigate by taking into account evidence concerning an offender's mental condition. In the ICC Statute, however, it is possible that the term “destroys”⁹⁶ precludes the ICC from taking such evidence into account. The use of “destroys” may, that is, be taken as signaling the rejection of the notion of reduced capacity. The answer to this question awaits the anticipated ICC's construction of the Statute. In this author's opinion, however, it is unlikely that the drafters of the Statute intended to bar the Court from using mental condition as a mitigating factor. There is a clear grant of discretion in the Statute's sentencing provisions, and there is no explicit prohibition of mitigation in Article 31(1)(a).

If these conclusions are valid, a second question is whether lawmakers or the international courts themselves should impose categorical limits on the “individual circumstances” that courts can take into account in exercising their discretion to mitigate sentences. The normative base does not impose specific parameters on “individual circumstances.”⁹⁷ Insofar as the mental condition of the offender is concerned, three options exist. The first is the Continental variant itself, under which mitigation is available only if sufficient evidence is produced to demonstrate the existence both of a mental condition (requiring, for example, a “mental disease or defect” or “abnormality of mind”) and of an impaired capacity to control or to appreciate the character of one's actions. A second option, less restrictive than the Continental variant, would be to require evidence sufficient to satisfy the medical definition, but to discard any requirement of establishing reduced impairment. It is possible to view the

also state that the Tribunals “shall have recourse to the general practice regarding prison sentences in the courts of” former Yugoslavia and Rwanda, respectively. ICTY Statute, *supra* note 4, Art. 24(2); ICTR Statute, *supra* note 5, Art. 23(2). Regarding sentencing by international tribunals, see William A. Schabas, *International Sentencing: From Leipzig (1923) to Arusha (1996)*, in 3 INTERNATIONAL CRIMINAL LAW, *supra* note 7, at 171–93. In 1996 the ICC Preparatory Committee considered (but ultimately rejected) arguments for very precise sentencing provisions, including minimum and maximum sentences for each infraction, *see id.* at 177. Regarding sentencing at the ICTY, *see id.* at 179–82.

⁹⁵ See *supra* note 94 and accompanying text.

⁹⁶ ICC Statute, *supra* note 3, Art. 31(1)(a); *see also supra* note 24 and accompanying text; discussion *supra* note 85 and accompanying text.

⁹⁷ As stated *supra* note 94, the ICTY and ICTR Statutes, Arts. 25 and 24, respectively, state that sentences should take into account the “general practice” of the criminal courts in the former Yugoslavia or Rwanda. Therefore, the ad hoc tribunals should attempt to determine whether such general practice is discernible in regard to mental incapacity. However, it is doubtful that the tribunals are bound to follow such practice when it is discernible. See Murphy, *supra* note 18, at 91; Schabas, *supra* note 94, at 179–80.

Čelebići Camp Chamber's mitigation of Esad Landžo's sentence⁹⁸ in this way: When it reduced Landžo's sentence, the Chamber cited as one of the mitigating factors "the evidence presented by the numerous mental health experts, which collectively reveals a picture of Mr. Landžo's personality traits that contributes to our consideration of appropriate sentence."⁹⁹ Thus, it might be said that the Chamber's action is illustrative of the second option, because the Chamber had earlier concluded that Landžo had satisfied the "abnormality of mind" prong of the diminished responsibility test but not that of "substantial impairment." The third option is to permit the court to use any evidence of the offender's mental condition, whether or not it would have satisfied the medical definition element in the mental incapacity test. It is also possible that the Chamber's mitigation of Landžo's sentence reflects this approach: by expressly referring to Landžo's personality "traits," the Chamber was perhaps indicating that it consciously used expert-witness evidence

Landžo's mental condition even though that evidence may not have reached the level of the "abnormality of mind" standard. The Chamber had heard testimony from the prosecution's expert, who concluded that Landžo did not suffer from mental incapacity. Distinguishing between personality "traits" and "disorders," that expert reasoned (in part) that Landžo's personality characteristics amounted to the former, not the latter.¹⁰⁰

Consideration of the above three options requires a balancing of sentencing objectives against concerns about fundamental fairness to defendants. For example, since the second and third options would not require a nexus between the offender's mental condition and the crime, there may be some question whether those options might erode the international prosecution system's goals of justice, punishment, and prevention. In addition, a reduced sentence for a potentially dangerous offender evokes considerations of public safety—and with it, the question of medical disposition, to which we now turn.

IV. MEDICAL DISPOSITION FOLLOWING ACQUITTAL OR TERM OF IMPRISONMENT

Recognition of the mental incapacity defense has not, in international law, been accompanied by the development of some system for the medical disposition either of persons acquitted on the basis of mental incapacity or of offenders whose sentences have been mitigated on the basis of reduced capacity but who are deemed to constitute a danger to society.¹⁰¹ As the international system is currently constituted, the more severe a defendant's mental illness or disorder, the greater the chances that he or she will be completely relieved of legal responsibility, or will have his or her sentence reduced accordingly. Consequently, persons who have committed violent acts and who might for that reason pose a significant

⁹⁸ See *supra* note 34 and accompanying text.

⁹⁹ *Čelebići Camp* Judgement, *supra* note 10, para. 1284. The Chamber did not quantify the specific effect of mitigation upon the Landžo's term of imprisonment.

¹⁰⁰ See *Čelebići Camp* Judgement, *supra* note 10, para. 1180 (testimony of Dr. Landy Sparr). The manual of the American Psychiatric Association, often cited in the testimony of the expert witnesses in *Čelebići Camp*, defines "personality traits" as:

prominent aspects of personality that are exhibited in a wide range of important social and personal contexts. Only when personality traits are inflexible and maladaptive and cause either significant functional impairment or subjective distress do they constitute a Personality Disorder.

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 770 App. C (4th ed. 1994).

¹⁰¹ In addition, it does not appear that provision has been made for an accused who is determined unfit to stand trial. Despite this, at least two defendants before the ICTY have been examined for purposes of this determination. See *supra* note 17. Concerns about this matter were raised in the drafting process of the ICC. See ICC STATUTE: A DOCUMENTARY HISTORY, *supra* note 14, at 491. Questions of medical disposition are examined in TREATMENT OF OFFENDERS WITH MENTAL DISORDERS (Robert M. Wettstein ed., 1998); Christopher M. Green, Laurence J. Naismith, & Robin D. Menzies, *Criminal Responsibility and Mental Disorder in Britain and North America: A Comparative Study*, 31 MEDICINE, SCI. & L. 45 (1991). For a detailed description of the system in one country—the United Kingdom—see James C. Beck, *Forensic Psychiatry in Britain*, 23 BULL. AM. ACAD. PSYCHIATRY & L. 249, at 251–56 (1995).

threat to society (whether they continue to suffer from mental illness or not) will perhaps be released from custody¹⁰² long before they would have been but for the existence of the mental condition.

The absence of a system for involuntary commitments—when they are deemed justified on the basis of dangerousness—threatens the credibility of international prosecution. At the root of public apprehension about the mental incapacity defense are concerns about public safety,¹⁰³ and protection of the public is integral to the objectives of restoring and preserving the peace. The absence of a system of involuntary commitments also threatens the culture of legality: it must be asked whether courts, aware of the unavailability of such a system, would give proper consideration to the mental incapacity defense despite their textual authorization (and obligation) to do so.

It is possible, but doubtful, that the normative base includes implicit authority to order involuntary commitments. The respective statutes contain provisions for the courts' post-sentencing supervision, but the text of these provisions relates solely to supervising the conditions of imprisonment.¹⁰⁴ These or other provisions could potentially be construed to include medical disposition while the offender is serving the prison sentence. There is nothing in the relevant texts, however, to support involuntary commitment of an acquitted person or of an offender who has finished serving his or her sentence. In fact, an involuntary commitment could trigger the provision in the ICC Statute that grants an enforceable right of compensation to an arrested or convicted person whose arrest or detention was unlawful.¹⁰⁵

Even if there were a normative base for involuntary commitment, the international prosecution system would need to coordinate that commitment effort with municipal legal and medical authorities. In addition, any system of medical dispositions should take cognizance of international human rights standards governing the rights of persons subject to involuntary commitment on mental health grounds,¹⁰⁶ such as the December 17, 1991 UN General Assembly Resolution on "The protection of persons with mental illness and the improvement of mental health care."¹⁰⁷

V. CONCLUSION

Although it is only a single, relatively isolated item in the myriad issues associated with the rapidly evolving system of international prosecution, the mental incapacity defense could have an impact on public perceptions far beyond its limited place in the overall structure of that system. Excuse defenses play a paradoxical role in international prosecution: they pose a threat to the attainment of the objectives of justice, redress, protection, and prevention associated with the principle of accountability for serious violations of humanitarian

¹⁰² Common Rule 99(A) of the ICTY RPE and ICTR RPE states that the accused shall be released immediately in case of acquittal. ICTY RPE and ICTR RPE, *supra* note 9.

¹⁰³ See SLOVENKO, *supra* note 46, at 182.

¹⁰⁴ See ICC Statute, *supra* note 3, Art. 106(1); ICTY Statute, *supra* note 4, Art. 27; ICTR Statute, *supra* note 5, Art. 26; see also Rules 104 of the ICTY RPE and ICTR RPE, *supra* note 9.

¹⁰⁵ ICC Statute, *supra* note 3, Art. 85(1).

¹⁰⁶ The ICC Statute stresses compliance with human rights standards. See Gallant, *supra* note 57, at 693–722 (including the possibly relevant consideration of rights of privacy, see *id.* at 706).

¹⁰⁷ UN Press Release GA/8307, Jan. 21, 1992, at 322, available in <<http://www.un.org>> (General Assembly documents); <[gopher://gopher.un.org:70/00/ga/recs/46/119](http://gopher.un.org:70/00/ga/recs/46/119)>. Also, the human rights system under the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221) has developed an extensive body of case law on rights associated with involuntary commitment. For example, a recent European Court of Human Rights decision in this area is *Erkalo v. Netherlands*, Judgment, No. 89/1997/873/1085 (Sept. 2, 1998), available in the Website of the European Court <<http://www.echr.coe.int>> (continued detention, absent judicial order, of mentally ill person beyond expiration of initial placement order constituted an unlawful deprivation of liberty under Art. 5(1) of the European Convention on Human Rights).

law. And yet, the excuses are made available because they serve fundamental fairness and are viewed as an essential component of a culture of legality.

Although it has often been a subject of controversy, the development of the mental incapacity defense in municipal legal systems has been accompanied by a legal and extra-legal infrastructure that includes procedural rules, substantive standards, and institutions—all of which are necessary for the legal and medical disposition of criminal defendants. In the international system, however, the mental incapacity defense exists in something of a vacuum, and the absence of attention to the required infrastructure could be perceived as a lack of seriousness concerning this and other defenses to criminal liability, with negative consequences for the system's credibility.

It will be important for participants in the development of the system of international prosecution to resist the tendency, illustrated by the treatment of the defense of diminished responsibility in *Čelebići Camp*, to borrow from a particular municipal model without adequate assessment of the model's consistency with international norms and procedures. It was not the Trial Chamber's intent in that case to do so, but given the complexity of the issues involved and the tremendous demand of a voluminous factual record and a range of numerous other pressing legal issues, the result was an arguably unconsidered reliance on the English variant for dealing with the mental incapacity defense. The experience of the system at this point therefore suggests that, although much of the normative function concerning the mental incapacity defense has been delegated, in effect, to the international courts, what is needed, instead, is a multidisciplinary effort in which the work of the courts and international lawmakers will be informed by input from international, comparative, and criminal law specialists, as well as from mental health professionals.

PETER KRUG*

ENFORCEMENT AND COUNTERMEASURES IN THE WTO: RULES ARE RULES—TOWARD A MORE COLLECTIVE APPROACH

In the thirty cases that have led to the adoption of dispute settlement reports in the World Trade Organization (WTO), the enforcement tool of last resort—countermeasures—has been invoked five times.¹ This number is more—in five years—than in the forty-seven-year history of the General Agreement on Tariffs and Trade (GATT), the WTO's predecessor.² In addition, on six occasions WTO members have invoked the expedited procedure to solve disagreements concerning compliance with dispute settlement reports, a procedure newly

* University of Oklahoma College of Law. This comment expands on a paper presented at the annual conference of the International Academy of Law and Mental Health, held in Toronto on June 17, 1999. The author wishes to thank the University of Oklahoma College of Law for a summer research grant that provided support for this project.

¹ See the disputes on *European Communities—Regime for the Importation, Sale and Distribution of Bananas* [hereinafter EC—Bananas], WTO Doc. Series WT/DS27, where the United States retaliated and Ecuador recently requested authorization to do the same; *European Communities—Measures Concerning Meat and Meat Products (Hormones)* [hereinafter EC—Hormones], WTO Doc. Series WT/DS26 & WT/DS48, where both the United States and Canada retaliated; and *Australia—Measures Affecting the Importation of Salmon* [hereinafter Australia—Salmon], WTO Doc. Series WT/DS18, where Canada's request for authorization to retaliate is still under consideration. In all cases arbitration on the level of suspension was requested under DSU Article 22.6. Each time the original panel acted as arbitrator.

² In two GATT cases authorization to take countermeasures within the GATT framework was requested. First, the Working Party on *Netherlands Action under Article XXIII(2) to Suspend Obligations to the United States*, GATT BISD 1S/62 (Nov. 8, 1952), authorized the Netherlands to retaliate against the United States, but the Netherlands never exercised this authorization. Second, in *United States—Taxes on Petroleum and Certain Imported Substances* [hereinafter US—Superfund], GATT BISD 34S/136 (June 17, 1987) (panel report), both the European Communities and Canada requested authorization to retaliate, a request that was blocked by the United States (case reported in ROBERT HUDEC, ENFORCING INTERNATIONAL TRADE LAW 211 (1993)).

introduced with the establishment of the WTO.³ In another case, compliance procedures are looming.⁴

This relatively frequent recourse to countermeasures and compliance procedures suggests that the practical enforcement of WTO rules through dispute settlement may be too arduous. The time is ripe for a critical review of the WTO dispute settlement system, especially its enforcement mechanism and the remedies it provides.

The first section of this Note summarizes how WTO rules and dispute settlement reports are enforced. The second section critically examines from a more general perspective the WTO regime of countermeasures and enforcement. The argument is that WTO rules should be considered as creating international legal obligations that are part of public international law, and that a more collective and effective enforcement mechanism, one aimed at inducing compliance, is required. The third section sets forth further suggestions for improving the practical enforcement of WTO rules. The Note ends on a word of caution.

I. HOW ARE WTO RULES AND DISPUTE SETTLEMENT REPORTS ENFORCED?

WTO rules are enforced through a WTO-specific dispute settlement system. This system is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes, or DSU,⁵ one of the cornerstones of the 1994 Marrakesh Agreement Establishing the WTO. The quasi-judicial leg of this dispute settlement mechanism—to which all WTO members can have automatic recourse⁶—consists of ad hoc three- or possibly five-member panels and a standing Appellate Body. They issue reports with findings and recommendations on a dispute. In order to obtain legal status, these reports are referred to, and need to be adopted by, the WTO's dispute settlement body (DSB), a one-member-one-vote political organ.

The adoption of the DSU brought about a legal revolution. Moving from one step to the next in the process no longer requires—unlike the GATT—the consensus of all WTO members. The establishment of a panel, the adoption of panel and Appellate Body reports, and the authorization to retaliate occur automatically *unless there is a consensus against it*.⁷ The DSU transformed the GATT's positive-consensus rule into a negative one. As a result, the WTO dispute settlement process is not only compulsory, but also virtually automatic. This novelty should be applauded. It allows politically sensitive cases to be pursued, and it protects the weaker WTO members that previously were either unable or insufficiently daring to muster a consensus in support of their complaints.

In the event a breach of WTO rules is found, the DSB recommends that the member concerned “bring the measure into conformity”⁸ with the WTO agreement that has been violated. “Withdrawal” of the measure concerned is usually required. In addition, the panel and Appellate Body may “suggest ways in which the Member concerned could implement the recommendations.”⁹ Prompt compliance with the recommendations and rulings of the

³ Twice in *EC—Bananas* (WTO Doc. WT/DS27/RW/ECU and WT/DS27/RW/EEC) and once in *Australia—Salmon* (WTO Doc. WT/DS18/14), plus *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather* (WTO Doc. WT/DS126/8), *Brazil—Export Financing Programme for Aircraft* (WTO Doc. WT/DS46/13), and *Canada—Measures Affecting the Export of Civilian Aircraft* (WTO Doc. WT/DS70/9). In the latter four cases the compliance procedure is still pending at the time of writing. Compliance procedures are conducted pursuant to DSU Article 21.5.

⁴ Case on *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/16 (Jan. 12, 2000) (complaint by Malaysia).

⁵ The DSU can be found on the WTO Web site at < <http://www.wto.org/wto/dispute/dsu.htm> >.

⁶ DSU Article 6.1. All WTO members recognize the jurisdiction of the WTO dispute settlement system as compulsory and exclusive in respect of seeking redress of inconsistencies under WTO rules. *Id.*, Art. 23.1.

⁷ See, respectively, DSU Arts. 6.1, 16.4, 17.14, 22.6.

⁸ *Id.*, Art. 19.1.

⁹ *Id.*

DSB is explicitly called for.¹⁰ If it is “impracticable to comply immediately,” however, the losing member is given a “reasonable period of time” within which to comply, which is determined either by agreement or by binding arbitration.¹¹

If compliance is not achieved within the time period thus specified, the defaulting member can offer “compensation.” It is generally understood, moreover, that compensation is to be offered not only to the winning party, but to all WTO members.¹² Rather than being pecuniary in character, compensation involves the *lifting* of trade barriers—such as tariff reductions or increases in import quotas—by the losing party. Arrangements for compensation thereby work to support free trade principles. Nevertheless, since the prevailing member has to agree not only to be compensated, but with the specific amount thereof,¹³ compensation is a rare event.

If no satisfactory compensation can be agreed upon, the prevailing member can request authorization from the DSB to take countermeasures (in WTO jargon, “to suspend concessions or other obligations under the covered agreements”¹⁴). DSB authorization of the countermeasures is virtually automatic; it can be withheld only if there is a consensus against them.¹⁵ DSU countermeasures need to be “equivalent to the level of the nullification or impairment” caused by the measure that was found to be in breach.¹⁶ Countermeasures in the WTO are of a bilateral nature. They can taken only by members that were complaining parties—not by third parties or, *a fortiori*, by members not involved in the dispute. As opposed to compensation, retaliation implies the *raising* of trade barriers by the winning member vis-à-vis the losing member, a move detrimental to free trade principles.

Three additional tools are available for the purpose of bringing about compliance. First, the DSB continuously monitors the implementation process, which is an important political inducement to comply.¹⁷ Second, in the event of disagreement on whether compliance occurred, the original panel can be called in to decide.¹⁸ Third, if parties disagree on the level of countermeasures or on certain other related matters, this dispute is sent to arbitration.¹⁹

To make an analogy with the traditional international law remedies of “cessation” and “reparation,” the first and last objective of compliance in the WTO—usually, the withdrawal of the inconsistent measure—can be seen as the equivalent of the international law obligation of cessation of wrongful conduct.²⁰ With few exceptions, however, GATT, as well as WTO, recommendations and rulings have not required the member in breach of GATT/WTO rules to make reparation for the damage caused in the past.²¹ So far, WTO

¹⁰ *Id.*, Art. 21.1.

¹¹ *Id.*, Art. 21.3.

¹² As stated in DSU Article 22.1 (last sentence), “Compensation is voluntary and, if granted, shall be consistent with the covered agreements”—including, it would seem, the basic principle of nondiscrimination enshrined in the most-favored-nation (MFN) clause (GATT Article I). For an example, see the compensation offered by Japan on an MFN basis—in the form of tariff concessions—for the delay in implementation in *Japan—Taxes on Alcoholic Beverages*, WTO Doc. WT/DS10/19 (Jan. 12, 1998).

¹³ DSU Arts. 22.1 and 22.2.

¹⁴ Nowhere in the DSU is the term *countermeasure* or *retaliation* used. In this Note, both terms will be used as having the same meaning. Below, it is questioned whether the suspension of concessions or other obligations under the DSU can actually be described as “countermeasures,” since their implicit objective is to compensate rather than to induce compliance.

¹⁵ DSU Arts. 19.1, 22.6.

¹⁶ *Id.*, Art. 21.4.

¹⁷ *Id.*, Arts. 21.3, 21.6. Note, in particular, that the “issue of implementation . . . may be raised at the DSB by any Member at any time.” *Id.*, Art. 21.6 (emphasis added).

¹⁸ *Id.*, Art. 21.5.

¹⁹ *Id.*, Art. 22.6.

²⁰ See International Law Commission Draft Articles on State Responsibility [hereinafter ILC Draft], Article 41, adopted on first reading in 1996, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996).

²¹ ILC Draft, *supra* note 20, Arts. 42–46. However, in six of the GATT panel reports that addressed either anti-dumping or countervailing duties against alleged subsidies (only three of which reports were adopted), the panel found in one way or the other that duties levied in breach of the rules had to be reimbursed.

remedies have offered only prospective relief—in the best circumstances, an immediate withdrawal of the inconsistent measure upon the adoption of DSB recommendations and rulings.²² More probably, however, and strictly within legal bounds, the measure will be withdrawn only by the end of the “reasonable period of time.” If not so withdrawn, “reparation” is provided in the form of compensation for damages, but typically counting only from the date of expiration of the “reasonable period of time.”²³ If compensation cannot be agreed upon, *member-to-member* countermeasures can be taken. There are currently no *collective* remedies or sanctions by the WTO membership as a whole.

II. CRITICAL EXAMINATION OF THE WTO REGIME OF COUNTERMEASURES AND ENFORCEMENT

The proliferation of substantive WTO rules, coupled with a quasi-automatic, rules-based dispute settlement system, led to an exponentially growing number of disputes being brought to the WTO, including the politically sensitive ones.²⁴ This obvious success of the DSU is testimony to the high expectations that were raised by the new system. Regrettably, however, it seems that the proliferation of rules and the associated “legalization” of dispute settlement have not been paired with a strong enough enforcement mechanism. As a result, although many disputes under the GATT either did not achieve or would not have achieved a consensus for submission to a panel and for adoption of the panel’s report, many such disputes have now been successfully brought to the WTO but been stranded against the wall of noncompliance.²⁵ This enforcement problem may result, in part, from the move from a power-based to a rules-based system while leaving the domain of remedies largely untouched. The “legalization” of disputes under the WTO stops, in effect, roughly where noncompliance starts.

For members disputing a case at arm’s length—in practice, mostly the developed members—the resurgence of economic and political power as factors in achieving compliance may be manageable. In those instances countermeasures may, indeed, gradually induce compliance. In the contrasting case where a weaker member is faced with noncompliance by a disproportionately stronger member, the reactivation of power politics—which are at play in negotiations on compensation and the possible imposition of countermeasures—may make compliance very hard to achieve.²⁶ Such negotiations highlight and effectively uphold the inevitable economic and political inequality between WTO members (as equal as they may be in the eye of the law). Would it not be difficult in practice—indeed, even counterproductive—for say, Burkina Faso or Estonia to take countermeasures against, for example, the United States or the European Community? Difficult because retaliation may, in turn, provoke counterretaliation in non-WTO-related fields such as development aid, and counterproductive because fencing off Burkina Faso’s or Estonia’s market from much needed U.S. or EC imports would mostly harm the former, not induce compliance by the latter.

²² Few studies are available on remedies under the WTO. For an excellent contribution see Hendrik Horn and Petros C. Mavroidis, *Remedies in the WTO Dispute Settlement System and Developing Country Interests*, World Bank Institute, available in <<http://www1.worldbank.org/wbi/trade>>.

²³ See *supra* note 12. It could be argued, however, that compensation as provided for in the DSU—even if it were restricted to prospective damage only—should be paid from the date of adoption of the reports. The “reasonable period of time” given to comply delays the remedy of cessation, but not the altogether different remedy of compensation. The DSU is not conclusive on this point.

²⁴ See the Overview of the State-of-Play of WTO Disputes, regularly posted on the WTO Web site at <<http://www.wto.org/wto/dispute/bulletin>>. So far, almost 150 distinct matters have been brought under the DSU in the WTO’s five-year history.

²⁵ This problem is especially likely to occur in politically sensitive disputes such as *EC—Hormones* and *EC—Bananas*, *supra* note 1. It would, for example, most likely have occurred if the United States had lost the dispute in *United States—The Cuban Liberty and Democratic Solidarity Act*, WTO Doc. Series WT/DS38, a case that the European Communities ultimately did not pursue further.

²⁶ Even if compliance eventually occurs, the interested sectors of the weaker member may already have been forced out of business by that time.

In addition to the disadvantages related to bilateral state-to-state countermeasures, the WTO enforcement regime lacks the remedy of reparation—at least in the traditional sense of compensation for damages in the past. By way of contrast, when the International Court of Justice (ICJ) issues a judgment and finds that a state has breached a rule of international law, the state held in breach will be responsible, first, to stop the breach if it is one of a continuing character and, second, to make reparation for it.²⁷ In this sense, the WTO offers less than the ICJ.

In another respect, the WTO—in particular, the elaborate enforcement provisions of the DSU—is a step ahead of the ICJ and other international enforcement mechanisms, and provides one of the most developed enforcement regimes in international law. This comparative advantage is not merely the product of DSU's offering compulsory jurisdiction and a virtually automatic process. For example, although the ICJ calls for cessation, implicitly or explicitly, that is where its efforts normally end. There remains no doubt that the state in breach is under a legal obligation to stop the wrongful conduct, but the ICJ has no mechanism to enforce this so-called secondary legal obligation. Rules applicable to the ICJ do not foresee or address the problem of what to do in case of noncompliance.²⁸ As a result, the wrongful conduct often continues, or the prevailing state may decide to take unilateral countermeasures without being subject to any further monitoring (contrary to DSU countermeasures, which are multilaterally approved and monitored). In this sense, the WTO's forward-looking approach towards enforcement—not only of primary WTO rules, but also of secondary WTO rules—can be seen as a major step ahead in international law. The same can be said about the mandate granted to WTO panels and the Appellate Body not only to decide whether or not a breach occurred, but also to make suggestions on how to bring measures into conformity with WTO rules—a powerful tool that should be used more often.²⁹ In sum, rather than simply avoiding the problem of noncompliance by legally prohibiting it, the WTO enforcement regime faces the problem directly and tries to induce compliance through a set of detailed procedures. Although those procedures could be improved and might favor the strong, the WTO's enforcement regime is a distinctive and important advance within the international arena.

Both the weaknesses and the strengths of the WTO enforcement regime need to be understood and interpreted in light of the original GATT framework; that is, as a balance of negotiated concessions, not primarily as a set of legal rules. The WTO, like the GATT, is not an international agreement that can be invoked by mere acceptance. A state or independent customs territory does not become a WTO member simply in virtue of having signed myriad WTO agreements. An additional “entry fee” is required to become part of the WTO club. This “entry fee” consists of a series of trade concessions—tariff reductions, market-access commitments in respect of foreign services, and so on—that have to be granted to existing WTO members. These concessions are in addition to the multilateral obligations set out in the WTO agreements. Membership is secured only after these concessions are accepted by existing members as balancing the concessions that they will be giving to the newcomer through WTO membership. Consequently, at the foundation of a member-member relationship lies a delicately negotiated balance not only of rights and obligations explicitly enshrined in WTO agreements, but also of trade concessions exchanged at entrance and through a series of subsequent trade rounds.

As a result, instead of tackling breaches of international law obligations, the WTO's dispute settlement system, like that of the GATT, focuses on the “nullification or impairment” of

²⁷ ILC Draft, *supra* note 20, Arts. 41–46.

²⁸ See CHRISTINE GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 12 (1987), which states that “the award of remedies other than damages by international arbitral tribunals is extremely unusual.”

²⁹ In only 5 of the 27 cases that so far led to adoption of DSB recommendations did panels make suggestions under Article 19.1 of the DSU. Very few complainants request suggestions on implementation. Unfortunately, the Appellate Body has never made suggestions, however, on how its reports could be implemented.

benefits.³⁰ By the same token, the WTO's remedy of last resort is to "suspend concessions or other obligations." In other words, what is actionable under the WTO is not so much the breach of obligations, but the upsetting of the negotiated balance of benefits consisting of rights, obligations, and additional trade concessions. This approach directly parallels that of the GATT, in which there were basically two possible remedies of more or less equal value to restore the negotiated balance of benefits—in much the same way that there are two possible ways to equalize unbalanced scales. Either the party being challenged *removes* the upsetting, trade restricting act—that is, some weight is *taken out* on one side of the scales—or the party challenging enacts its own trade restriction by removing an earlier trade concession—that is, some weight is *added* on the other side. The resulting enforcement regime was, however—and somewhat paradoxically—both lenient and strict. On the one hand, the system was lenient: the customary consequences linked to a breach of an international law obligation—in legal terms, cessation and reparation, and in political terms, the shunning linked to a non-law-abiding party—were avoided. On the other hand, however, the system was uniquely strict: parties were held "responsible" not only for breaches of GATT obligations, but also for "nullification or impairment" caused by conduct that did *not* conflict with any specific GATT provision—the so-called "non-violation nullification or impairment."³¹

Even though, as explained earlier, rebalancing the scales is, within the WTO, stated to be only a temporary solution (the ultimate goal being compliance), these historical origins in the GATT are, unfortunately, still haunting the WTO legal system today. To quote one prominent author:

Like the GATT that preceded them, the WTO rules are simply not 'binding' in the traditional sense. . . . The only sacred, inviolable aspect of the GATT was the overall balance of rights and obligations, of benefits and burdens, achieved among members through negotiations. . . . The WTO substantially improved the GATT rules for settling disputes but did not alter the fundamental nature of the negotiated bargain among sovereign member states.³²

In accordance with this "old" but well-established line of thought, the WTO legal system is fundamentally a package of bilateral equilibria. It is based on a mainly bilateral view of the WTO legal matrix and its dispute settlement system. Put in simple terms, a WTO member may be called to justice when and because it upsets the balance negotiated with another member, not because it violates multilaterally agreed rules in place for the benefit of all WTO members and their economic operators. To make a comparison with national law, this old line of thought sees the relationship between WTO members as purely contractual, within the sphere of private law.³³ The WTO legal system is not considered to be an entity rooted in public law where public goods are at stake.

It is this background that must frame any discussion of enforcement in the WTO. If one holds the old GATT view and transposes it into the WTO, the current regime of counter-

³⁰ GATT Art. XXIII(1). It also refers to impeding the attainment of GATT objectives.

³¹ It is noteworthy that a finding of so-called nonviolation nullification and impairment does *not* require the member concerned to withdraw the measure. Making a "mutually satisfactory adjustment" suffices (DSU Art. 26.1(b)). The provision for nonviolation claims was designed to address a problem concerning tariff concessions under the original GATT, which could be easily circumvented by imposing similar restrictions in areas not regulated by GATT. This mode of circumventing GATT was possible because GATT's scope was so narrow. After the introduction of new rules and agreements through the Tokyo and (especially) the Uruguay Round negotiations, this argument, as well as the associated justification for allowing nonviolation claims, lost much of its validity.

³² Judith H. Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AJIL 416, 417 (1996). A stimulating—and in my view, correct—response to this article was provided by John J. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AJIL 60 (1997).

³³ Following this approach, WTO countermeasures have their counterpart in national law. They could be seen as the suspension or nonperformance of contractual obligations as a result of a breach of the contract by the other party. This concept also exists in the law of treaties. See Article 60 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, on "Termination or suspension of the operation of a treaty as a consequence of its breach."

measures and enforcement might be justified as a logical element in the upholding of mainly bilateral equilibria. Nevertheless, with the advent of the WTO—its legal refinement, quasi-judicial dispute settlement system, and, in particular, major expansion into new fields that *directly affect individuals*—it may be time to move away from the idea of the GATT/WTO only as a package of bilateral balances between governments. Has time not come to introduce the WTO as a truly multilateral construct providing legal rules as public goods that merit collective enforcement for the good of governments *and* economic operators?

Two steps in this direction need to be considered: First, WTO rules can and should be considered to be normal international legal obligations that are part of public international law. Second, the enforcement of WTO rules can and should be seen as a collective rather than a mainly bilateral exercise.

WTO Rules As International Legal Obligations

WTO rules, as well as DSB recommendations, should be considered binding legal obligations.³⁴ That is, if the DSB finds a breach of WTO rules, the member concerned should be considered to be violating its obligations under international law, as a consequence of which the member would be obligated, in turn, to stop the violation by bringing the inconsistent measure into conformity with WTO rules. This approach accords with the DSU's unambiguously providing that compensation and retaliation are only "temporary measures" that are not to be preferred to full compliance.³⁵ The approach also accords with the WTO's very first report, in which the Appellate Body made it clear that the WTO legal system is no longer to be seen—as some saw the GATT—as a self-contained regime.³⁶ Referring to DSU Article 3.2, which calls for WTO provisions to be clarified "in accordance with customary rules of interpretation of public international law," the Appellate Body made the following point: "That direction [in DSU Article 3.2] reflects a measure of recognition that the [GATT] is not to be read in clinical isolation from public international law."³⁷ It is true that the DSU has to be considered as *lex specialis* and that it can—and in certain areas, does—deviate from general international law. If any ambiguity were to persist in the DSU, however, as to whether a breach of WTO rules activates the secondary obligation of cessation, recourse should be made to residual international law rules. These rules make clear beyond doubt that in case wrongful conduct is found, the state concerned has to stop that conduct. The DSU determines, in turn, the means by which the prevailing WTO member is authorized to obtain fulfillment of that secondary legal obligation of cessation.

The changing character of WTO rules and the parties they affect also provides some reason to move toward seeing WTO obligations as ones of international law. Ever more precise and expanding WTO rules increasingly affect not only members as governments, but also individuals, consumers, and other economic operators in domestic and global marketplaces. Whereas a balancing act may be acceptable to governments, legal rules affecting individuals call for greater predictability and stability.³⁸ Such rules therefore need

³⁴ For arguments in support, see Jackson, *supra* note 32.

³⁵ DSU Arts. 22.1 and 3.7.

³⁶ Much depends, of course, on how one defines a "self-contained regime." See Bruno Simma, *Self Contained Regimes*, 1985 NETH. Y.B. INT'L.L. 115. In my view, as far as the WTO is concerned, the criterion of *lex specialis*—as set out in Article 37 of the ILC Draft, *supra* note 21—should apply; that is, the general international law rules in the ILC Draft do not apply "where *and to the extent that* the legal consequences of an international wrongful act of a State have been determined by other rules of international law relating specifically to that act" (emphasis added).

³⁷ WTO Appellate Body, United States—Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R, at 17 (Apr. 29, 1996).

³⁸ The idea of providing predictability to economic operators, not just states as governments, has already been incorporated in GATT case law (see panel report in US—Superfund, *supra* note 2, paras. 5.2.1–5.2.2). In addition, a recent WTO panel report stressed the importance of "the creation of market conditions conducive to individual economic activity in national and global market places and . . . the provision of a secure and predictable multilateral trading system" as crucial objectives and purposes of the DSU and, more generally, of the WTO. The

to be respected as international obligations, not as some political promise that can be withdrawn or exchanged for another. Moreover, with the entry into force of WTO agreements that are unrelated to the idea of balancing trade concessions that are additional to the rules set out in the agreement itself—such as the Agreements on Trade-Related Aspects of Intellectual Property Rights (TRIPS)³⁹ and Sanitary and Phytosanitary Measures (SPS)—the customary rationale for enforcement, which is based on the adjustment of the bilateral-contractual balance of concessions between members, became less relevant.⁴⁰ The fact that negotiating WTO agreements continues to be a balancing exercise of give and take—in which, for example, developing countries accepted the TRIPS Agreement in exchange of agreements on agriculture and textiles—does not, in and of itself, warrant a continued and exclusive focus on bilateral balances. Is not each and every international treaty the result of compromise and of give and take? Can there be no decision that a *binding* international treaty has been breached, just because the injured party can, in response to such breach, suspend the treaty (equalize the balance), in whole or in part?⁴¹ Obviously not.

In the context of reinterpreting WTO rules as creating international legal obligations, it would be opportune to revisit the WTO's unique rubric of the "nullification or impairment of benefits" through perfectly legal conduct.⁴² Instead of providing this cause of action against lawful conduct in very broad terms under almost all WTO agreements, it could, for example, be provided only in specific circumstances under certain WTO rules—when there is a clear justification for creating such a cause of action.⁴³ In the end, what would then be actionable under WTO law would be conduct inconsistent with WTO rules, nothing more, nothing less.

Towards a More Collective Enforcement Mechanism in the WTO

Insofar as WTO rules are interpreted as international legal obligations to the benefit of all members and economic operators in domestic and global market places, the target of the DSU should be to eradicate WTO-wrongful conduct in pursuit of public goods. The idea of challenging a WTO-inconsistent measure as conduct beneficial to the collective membership has already left its first mark.⁴⁴ In *EC—Bananas*, the Appellate Body decided that the United States could bring a case under GATT even though it hardly produces

report also introduced the principle of "indirect effect" of WTO rules. See United States—Sections 301–310 of the Trade Act of 1974, WTO Doc. WT/DS152/R, paras. 7.72–7.92 (Dec. 22, 1999) (panel report).

³⁹ As opposed to the agreements on trade in goods (GATT) and trade in services (GATS), the TRIPS Agreement is a set of treaty provisions *without* member-specific schedules in which additional concessions are made. Only the provisions of the agreement itself govern the TRIPS area. In that sense, it is more of a traditional international-law treaty.

⁴⁰ In this respect, it is interesting to note that the member-specific schedules of concessions—the main yardstick in the traditional balance between members—are also now seen by the Appellate Body as treaty text that is part of the Marrakesh Agreement Establishing the WTO. See WTO Appellate Body, *EC—Customs Classification of Certain Computer Equipment*, WTO Doc. WT/DS62/AB/R, para. 84 (June 26, 1998). In other words, these concessions are, as well, no longer seen as bilateral-contractual, but as a result of the common intention of all WTO members. The Appellate Body considers the concessions as setting out international legal rights and obligations subject to the laws of treaty interpretation in the Vienna Convention on the Law of Treaties, *supra* note 33.

⁴¹ See *supra* note 33.

⁴² See *supra* note 31. In 2000, WTO members have to decide whether or not to expand the so-called nonviolation and situation cause of action present in GATT and GATS (nonviolation complaints only) to the TRIPS area, pursuant to Article 64.3 of the TRIPS agreement. For a discussion, see WTO Doc. IP/C/W/124 (Jan. 28, 1999) (access restricted to WTO members).

⁴³ An example of where the nonviolation idea was transposed into a specific treaty obligation could be found in the WTO's Agreement on Subsidies and Countervailing Duties, specifically when it deals with so-called actionable subsidies (Part III). There, the obligation in case of noncompliance is not to eradicate the subsidy. It is to make sure, instead, that the adverse effects of the subsidy are removed (Article 7.8).

⁴⁴ In this respect, DSU Article 3.5 should also be noted. This provision requires that all solutions to disputes have to be consistent with WTO rules. No room is thus left for a bilateral compromise to prevail over multilateral WTO rules. See also *supra* note 17.

bananas and has not yet exported any. The Appellate Body found that in order to bring a case under the DSU, no legal interest is required. It quoted with approval the following remark from the panel report: "with the increased interdependence of the global economy, . . . Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly."⁴⁵

An interesting consequence of the *EC—Bananas* decision is that a member could win a case all the way through the Appellate Body without having a tangible trade interest in the WTO-inconsistent measure. When that member was faced with noncompliance, however, it would not be able to claim compensation or, arguably, retaliation; retaliation is explicitly linked to "nullification and impairment" of benefits, that is, to trade effects.⁴⁶ This situation is representative of the growing tension within the WTO legal system between protecting bilateral-contractual balances and enforcing multilateral rules.

One means of easing this tension could be to make WTO remedies—and not only the legal standing to bring a case—more collective in character. Compensation, for example, already has that multilateral character, and, as noted earlier, it is generally understood that compensation is to be offered not only to the winning party, but to all WTO members.⁴⁷ Countermeasures could also be made more collective. In this context it would be helpful to reconsider not only the actual effect of DSU countermeasures and the way they are calculated, but the specification of who is allowed to retaliate and what form such retaliation can take.

It should be recalled that DSU countermeasures are basically trade restrictions that a winning member is allowed to impose against goods coming from a losing member. They imply a rebalancing of the scales, referred to earlier, a solution that under the GATT could have been final, closing the case. Upon closer consideration, however, DSU countermeasures represent the epitome of mercantilism. The assumption is that protecting your market will bring you gains, offset the "nullification or impairment" caused by the measure found to be WTO inconsistent, and force the losing member to remove the inconsistency. It is worth noting the irony that the world body preaching the liberalization of trade depicts trade protectionism—countermeasures—as offering some kind of favor or benefit that should neutralize the effect and even force the disappearance of illegal trade restrictions imposed by others. Nevertheless, as conceded by the arbitrators in *EC—Bananas*, "the suspension of concessions is not in the economic interest of either [party]."⁴⁸

Independent of the actual effects that countermeasures have, arbitration panels have ruled (and in my view, correctly) that "the *purpose* of [DSU] countermeasures [is to] *induce compliance*."⁴⁹ If you combine the above-mentioned economic inefficiency of countermeasures with the current *level* of DSU countermeasures, which has to be "equivalent" to the

⁴⁵ Appellate Body report on *EC—Bananas*, WTO Doc. WT/DS27/AB/R, para. 136 (Sept. 9, 1997).

⁴⁶ See *supra* note 16 and the discussion of this issue in the *EC—Bananas*, arbitration report, WTO Doc. WT/DS27/ARB, paras. 6.8–6.10 (Apr. 9, 1999). If one took a more collective approach to WTO rules, however, the mere breaking of the rules without trade effects could be said to have a damaging effect; that is, though without a definitive, tangible trade effect on even a single member, the violation may be seen as having a damaging effect on the collective WTO membership. This effect could then arguably justify both compensation and countermeasures in cases where no direct trade effect is apparent.

⁴⁷ Only the winning party has to give its approval to the idea and level of compensation, but once the losing party grants it—for example, by reducing its tariffs on products X and Y—that party has to do so with respect to all WTO members. See *supra* note 13. In order to favor the winning party in particular, however, the agreement on compensation is most likely to apply to products that are of exclusive or particular interest to the winning party. See, for example, the E.C./U.S.-Canada compensation negotiations in *EC—Hormones*, *supra* note 1, where buffalo meat was singled out.

⁴⁸ *EC—Bananas*, arbitration report, *supra* note 46, para. 2.13.

⁴⁹ *Id.*, para. 6.3 (first emphasis added). See also *EC—Hormones*, arbitration report, WT/DS26/ARB, para. 39 (Canadian case), and WT/DS48/ARB, para. 40 (U.S. case) (July 12, 1999).

actual damage caused by the WTO inconsistent measure,⁵⁰ however, it is difficult to see how this purpose of inducing compliance can be achieved (except when countermeasures are imposed by a member disproportionately stronger than the target of the countermeasures).⁵¹ Looking at the way the *level* of countermeasures is established—as equivalent to the nullification or impairment—countermeasures under the DSU seem to *aim* primarily (but, in my view, unsuccessfully) at “compensating” the winning party for the delay in implementation. Contrary to their stated purpose, the *effect* of DSU countermeasures does not seem to be that of inducing compliance—as in general international law, where countermeasures are retaliatory in character and put pressure on the losing party *on top of* and *distinct from* the obligation to compensate. In general international law, countermeasures exert pressure that is proportional to the original violation⁵² and serve as means to an end. Countermeasures—unlike compensation, for example—are not ends in themselves. Simply equalizing the score, as in compensation under the WTO, not only runs the risk that the lawbreaker is better off having broken the rules than it would have been had it complied with them (since no damages for the past are currently awarded). It also means that, apart from compensation, no further incentive is provided to remove the inconsistency. The WTO enforcement system thereby neglects the remedy of cessation—a remedy that is more important from the collective WTO membership’s point of view.

It could therefore be suggested that even during the period that countermeasures are imposed, the legal obligation to compensate should continue to exist. Indeed, coupled with countermeasures, a broad scheme of compensation—additional market access offered by the losing party to WTO members—would provide genuine leverage to induce compliance, a move beneficial to all WTO members, and not just “compensation” to the one or few that brought the case. By thus distinguishing (as in general international law) between countermeasures, on the one hand, and compensation and trade damage, on the other, effective countermeasures—not necessarily linked to trade damage—would become available for the purpose of enforcing WTO rules.⁵³

To highlight the risks and inefficiencies of a bilateral enforcement mechanism for multilateral rules, consider this scenario. Imagine two WTO members that are involved in two separate trade disputes between each other, with each of them being a complainant in one case and a defendant in the other. Both cases are won by the complainant. Both members refuse to comply. Both obtain authorization to suspend concessions. The two WTO-inconsistent measures have a negative trade effect that is equivalent. Can one inconsistent measure be labeled as the countermeasure against the other inconsistent measure? In other words, can one measure be “compensated” by the other and, as a result, can both members agree to continue their mutually inconsistent relationship unchanged? On the

⁵⁰ In *EC—Hormones*, *supra* note 1, for example, the estimated total beef exports without the hormone ban in place were calculated. From that amount, actual exports were deduced. The end figure, expressed in price terms, was then the value of EC imports that the United States and Canada were allowed to target with 100%, prohibitive tariff rates. In other words, the value of product kept out by the hormone ban was aimed at being equivalent to the value of product kept out by the countermeasures. *EC—Hormones*, arbitration report, *supra* note 49; see also *EC—Bananas*, arbitration report, *supra* note 46).

⁵¹ It is interesting to note that in the pre-DSU era, countermeasures only had to be “appropriate in the circumstances” (GATT Art. XXIII(2)), not “equivalent to the level of nullification or impairment” (DSU Art. 22.4).

⁵² Countermeasures in general international law have to be proportional to the original violation (in degree of gravity, as well as in effects). See Article 41 of the ILC Draft, *supra* note 20.

⁵³ See *supra* note 46. The idea of “punishing” through countermeasures should only exist in a collective system of enforcement. Indeed, if one were to incorporate a “punishment” factor in a bilateral system such as the current DSU, the effect would be that only those rules that strong players were willing to enforce would be backed up by “punishment.” Rules to the benefit of weaker players would be less likely to be enforced, their beneficiaries having fewer resources to bring a case, win it, and impose countermeasures. WTO arbitration panels have explicitly stated that DSU countermeasures are *not* of a punitive nature, *supra* note 49.

face of it, this situation would seem to be a possibility,⁵⁴ which highlights the absence of a genuine inducement to comply. Though satisfactory from the perspective of the two parties, this outcome would be an unfortunate one from the perspective of other WTO members, especially insofar as they were committed to seeing compliance with WTO rules as a collective good.

Another problem with the current regime of DSU countermeasures is that only the complaining party that prevailed in a dispute—and not other WTO members—can impose such countermeasures. A member prevailing in WTO dispute settlement therefore has to bear by itself not only the cost of legal proceedings, but that of taking economically inefficient countermeasures.⁵⁵ This cost could be made multilateral if some kind of collective action were possible through or by the DSB. In that case it would be the WTO as an organization, not one specific member, that attempts to enforce WTO rules.⁵⁶ Any member could, for example, be authorized to suspend concessions equivalent to the damage it has suffered, even if that member did not bring the case.⁵⁷ Moving away from the inefficient suspension of market-access concessions, the DSB could also suspend the operation of other WTO obligations. It could, for example, suspend one or more WTO rules or agreements (for example, the DSU or the TRIPS Agreement⁵⁸) to the extent that they benefit the losing member, and create obligations owed to any other WTO member, not just to the winning member.⁵⁹ (Even under current DSU rules, countermeasures can take the form of a suspension of “concessions or other obligations.”⁶⁰) Through such collective enforcement, weaker members prevailing in a dispute, but economically unable to take member-to-member countermeasures, could then have access to an effective remedy.⁶¹ Moreover, these weaker members could, under such an approach, also reap the benefits of cases brought and won by other members with more resources.

III. FURTHER SUGGESTIONS TO IMPROVE THE PRACTICAL ENFORCEMENT OF WTO RULES

Compensation under the DSU—which requires the losing party to *lower* its trade barriers—is difficult to obtain because it is subject to the agreement of the lawbreaker. It is, however, beneficial in the long term not only to the winning member, but also to the losing member and the entire WTO membership. Why not, therefore, make compensation com-

⁵⁴ Refer, for example, to the cases lost by the European Communities against the United States (*EC—Bananas*, *supra* note 1, and *EC—Hormones*, *supra* note 1), which could be “compensated” by or “balanced” with the U.S. loss, at least at the panel stage, with the case brought by the European Communities in *United States—Tax Treatment for Foreign Sales Corporations*, WTO Doc. WT/DS108/R, (Oct. 28, 1999) (panel report, currently under appeal).

⁵⁵ See Horn & Mavroidis, *supra* note 22, at 9–12.

⁵⁶ In this respect, lessons could be drawn from the U.N. Security Council model of collective enforcement. See, for example, Ch. VII of the UN Charter.

⁵⁷ Such suspensions could raise a problem of multiple calculations of “nullification or impairment” suffered by each of the members wanting to retaliate. However, once a formula has been accepted by arbitration in one case—referring, for example, to trade flows of the last three years—that formula can often be transposed to other cases, as well, so that only the member-specific data has to be filled in to come to a result (see, for example, the arbitration in *EC—Hormones*, *supra* note 49, where basically the same formula was used to calculate nullification in both the U.S. and Canadian complaints).

⁵⁸ For example, in *EC—Bananas*, *supra* note 1, Ecuador requested authorization to retaliate *not* by raising its tariffs on EC goods (a move that, according to Ecuador, would hurt instead of benefit its own economy), but by suspending certain of its obligations with respect to the European Communities under the TRIPS and GATS Agreements. See WTO Doc. WT/DS27/52 (Nov. 9, 1999). This request is still under consideration. What is referred to as “cross-retaliation” is governed by DSU Article 22.3.

⁵⁹ Collective DSB action in favor of a prevailing developing country could be taken already under the current rules. DSU Article 21.7 provides: “If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.” The problem, however, is that such DSB action requires a consensus of all WTO members, including the losing member. DSU Art. 2.4.

⁶⁰ *Id.*, Art. 22.6.

⁶¹ See *supra* note 59.

pulsory and automatic the way that countermeasures currently are? Without requiring the approval of both parties, the DSB could then automatically approve a request for compensation of a certain amount, in the form of increased market access to be granted by the loser.⁶² If a dispute arises over the amount of compensation requested, binding arbitration along the lines of the arbitration now available for countermeasures could be employed.⁶³ In addition, the current regime of countermeasures, which is aimed at inducing compliance rather than compensation, could be maintained (though perhaps also strengthened as suggested in the preceding section).

To ensure that the sector or industry that suffers the damage caused by a WTO-inconsistent measure actually benefits from the compensation, one could, alternatively, force the losing member to pay an amount of money equivalent to the damage caused. Following GATT/WTO practice, such pecuniary compensation would not need to work retroactively, that is, compensate for past damage. Pecuniary compensation would not only make more economic sense than both the suspension of concessions and a compensatory lifting of trade barriers in mostly unrelated sectors, it would also be easier to monitor⁶⁴ and more accessible for weaker WTO members.⁶⁵

Finally, although (as mentioned earlier⁶⁶) the GATT/WTO legal system now offers only prospective remedies and not remedies to make good past damage, new consideration should be given to the possibility of granting WTO members the remedy that is so obvious in general international law: reparation, including reparation for past damage. Techniques could be used to limit such reparation in time (for example, not before January 1, 1995, the date of entry into force of the WTO) and scope (for example, by requiring a strict causal link between the WTO inconsistency and the damage for which reparation is claimed).⁶⁷ As noted earlier, the WTO legal system is unique in its detailed focus on cessation and the consequences linked to its failure, a prospective remedy rarely addressed in general international law. To complement this uniqueness with some form of reparation would not only bring WTO law closer to public international law, however, but considerably strengthen the predictability and stability of the multilateral trading system. Nothing under the current rules or in any of the WTO disputes decided so far explicitly precludes reparation for the past. In the few cases where the issue was raised, it has not been decided.⁶⁸

⁶² One could argue that given the already very low level of tariffs, many WTO members may have little to offer in compensation. One could nevertheless think of other types of compensation than a lowering of import tariffs—for example, granting larger import quotas or making additional market-access commitments in services.

⁶³ The MFN level of compensation could be determined by the nullification suffered by the member that originally brought the case, assuming that that member will be affected the most by the inconsistent measure. However, in case another member considers itself to be affected even more—even if it did not bring the case in the first place—that member could be allowed to submit an additional request to raise the MFN level of compensation to a higher level.

⁶⁴ Pecuniary compensation would raise the problem of redistribution within the winning member. This problem exists with respect to all international claims compensated government-to-government, however. The rule of thumb, following principles of diplomatic protection, should be that, unless specific rules are framed, it is up to the receiving government to decide how the compensation is to be redistributed.

⁶⁵ A possible drawback linked to strong members being forced to pay pecuniary compensation to weaker members is that such compensation could be set off by the stronger member in other areas, such as development aid. As noted earlier, this drawback provides an additional reason to grant remedies not just to the winning member, but to all WTO members collectively. In contrast, when weaker countries have to pay pecuniary compensation to stronger, there may be a problem concerning the appropriate allocation of resources. This problem could be solved by imposing an obligation of due restraint on the stronger members, as already enshrined in the DSU. DSU Art. 24.1.

⁶⁶ See *supra* note 21.

⁶⁷ Another tool to bolster enforcement of WTO rules would be to give them “direct effect” in national courts. This Note discusses possible tools at the international, not the national level. “Direct effect” is, accordingly, not further discussed. See Piet Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 1997 COMMON MARKET L. REV. 11; Judson O. Berkey, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting*, 9 EUR. J. INT’L L. 626 (1998).

⁶⁸ So far only one WTO panel was faced with a request for reparation *ex tunc*. In *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WTO. Doc. WT/DS60/R, paras. 8.1–8.6 (June 19, 1998) (panel

IV. CONCLUSION

The political reality today indicates that acceptance of many of these suggestions to strengthen the WTO enforcement mechanism and the remedies it provides—for example, *ex tunc* reparation for breaches of WTO law—is still far away. It would therefore be wrong to take these important steps precipitously and without extensive discussion; doing so could threaten the political support and legitimacy of the WTO, in general, and of its dispute settlement decisions, in particular. Nevertheless, one of the objectives of legal research is to prepare the ground for change. Further work is needed to examine and assess the different alternatives that are available at the intersection of WTO and general international law. Once WTO rules have been accepted as international legal obligations that affect individuals and merit collective enforcement for the public good, however, and once this new perception has come to be accepted and entrenched, it will be increasingly difficult to justify both the absence of certain traditional remedies, including reparation, and the lack of a more effective system to induce compliance with WTO rules. As Robert Hudec noted in respect of the more general GATT/WTO history of legal enforcement: “The process of creating any legal system, where none existed before, can only come about slowly and incrementally. The ideas and institutions that make a legal system ‘effective’ have to grind themselves into the political attitudes of the society—here, the society of governments—over time.”⁶⁹

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report, rev'd by Appellate Body, WTO Doc. WT/DS60/AB/R (Nov. 2, 1998)), Mexico requested the panel to recommend that Guatemala refund antidumping duties already collected. The panel refused Mexico's request, however, without addressing the substantive issue of reimbursement of duties already collected. Further insight into the issue of reimbursement could be provided by the still pending Article 21.5 compliance panels referred to *supra* note 3.

⁶⁹ Robert Hudec, Broadening the Scope of Remedies in WTO Dispute Settlement, presentation at University of Amsterdam conference on Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals (May 6–7, 1999).

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